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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, and their Respective Member Lines,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

GRAHAM JAMES & ROLPH
LEONARD G. JAMES
ROBERT L. HARMON
F. CONGER FAWCETT
310 Sansome Street,
San Francisco 4, California,
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	5
Statement of the Case	5
1. Background—The Isbrandtsen Case and the Congressional Response	6
2. The Commission's Interpretation of Section 14b	8
3. The Court of Appeals' Affirmance	11
Reasons for Granting the Writ	14
Conclusion	25

Appendix A—Statutes Involved

Appendix B—Opinion and Judgment of the Court Below

Appendix C—Order Extending Time to File Petition for Writ of Certiorari

CITATIONS

Cases

	Pages
Aktiebolaget Svenska Amerika Linien (Swedish-America Line) v. Federal Maritime Commission, D.C. Cir. No. 18,554, decided June 10, 1965	22, 23-24
Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Commission, 310 F.2d 606 (9th Cir. 1962)	24
Brannan v. Stark, 342 U.S. 451, 96 L.Ed. 497 (1952)	15, 16
Burlington Truck Lines v. United States, 371 U.S. 156, 9 L.Ed.2d 207 (1962)	20
Chicago Junction Case (Baltimore & Ohio R.R. Co. v. United States), 264 U.S. 258, 68 L.Ed. 667 (1924)	20
Ex parte Young, 209 U.S. 123, 52 L.Ed. 714 (1908)	11, 19
Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 2 L.Ed.2d 926 (1958)	5, 6, 7, 14
Interstate Commerce Commission v. J-T Transport Co., 368 U.S. 81, 7 L.Ed.2d 147 (1961)	18
Morgan v. United States, 298 U.S. 468, 80 L.Ed. 1288 (1936)	20
Morgan v. United States, 304 U.S. 1, 82 L.Ed. 1129 (1938)	21, 22
National Labor Relations Board v. Metropolitan Life Insurance Co., 380 U.S. 438, 13 L.Ed.2d 951 (1965)	20
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 81 L.Ed. 1093 (1937)	20
Oklahoma Operating Co. v. Love, 252 U.S. 331, 64 L.Ed. 596 (1920)	11, 19
St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 80 L.Ed. 1033 (1936)	19

Statutes

Administrative Procedure Act, 5 U.S.C. §§1001 et seq.	3, 5, 19
Section 2, 5 U.S.C. §1001	5
Section 4, 5 U.S.C. §1003	4, 5, 12
Section 5, 5 U.S.C. §1004	4, 5, 12
Section 7, 5 U.S.C. §1006	4, 5, 12, 13, 21
Section 8, 5 U.S.C. §1007	4, 5, 9, 12, 13, 21

Pages

Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§601 et seq. 15
Section 8c(5), 7 U.S.C. §608c(5) 15
Section 8c(7)(D), 7 U.S.C. §608c(7)(D) 15, 16

Public Law 85-626, 72 Stat. 574 6

Public Law 86-524, 74 Stat. 253 7

Public Law 87-75, 75 Stat. 195 7

Public Law 87-346, 75 Stat. 762 et seq. 3, 5, 7, 12, 16, 17, 18, 25
Section 3, 75 Stat. 764 ..... 5, 6, 7, 9, 23

Review Act of 1950, 5 U.S.C. §§1031 et seq. 11
Section 1034 5
Section 1040 2

Shipping Act, 1916, as amended, 46 U.S.C. §§801 et seq. 3, 5
Section 1, 46 U.S.C. §801 5
Section 14, 46 U.S.C. §813 ..... 6, 7
Section 14b, 46 U.S.C. §813a ..... passim
Section 15, 46 U.S.C. §814 ..... 6, 11, 22, 23, 24
Section 22, 46 U.S.C. §821 ..... 5, 8

28 U.S.C. §1254(1) 2

Miscellaneous

Attorney General's Manual on the Administrative Procedure Act (1947) 19

Reorganization Plan No. 7 of 1961 (26 F.R. 7315) 7

Senate Report No. 860, 87th Cong., 1st Sess. (1961), pp. 9, 23 ..... 6, 17

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Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners Pacific Coast European Conference, Pacific Coast River Plate Brazil Conference, and their respective Member Lines, respectfully pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 3, 1965.

OPINIONS BELOW

The Report of the respondent Federal Maritime Commission, from which this case initially arose [R. XII-1118], is reported (without accompanying orders) in the Pike & Fischer loose-leaf service entitled "Shipping Regulation Reports", at 3 S.R.R. 677.[1] The opinion of the Court of Appeals [R. I-168], not yet officially reported, is reprinted in Appendix B hereto.[2]

JURISDICTION

The identical judgments of the Court of Appeals were entered February 3, 1965 [R. I-182, I-183; App.B, pp. 15, 16]. Timely petitions for review, filed March 4, 1965, were denied in a subsequent order filed April 30, 1965 [R. I-184-186]. An extension of time to file this petition was granted on July 17, 1965, extending the permissible time for filing until September 27, 1965 [App.C]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 5 U.S.C. §1040.

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[1]The opinion of the concurring and dissenting Commissioner John S. Patterson [R. XII-1164] commences at 3 S.R.R. 715.

Because of their excessive bulk, the various opinions at the Commission level—initial and final decisions, plus orders on remand—are all reprinted in a separate, Supplemental Appendix.

[2]References to the twelve-volume Record are to Volume and Page as designated in this Court, thus: "R. XII-1118," "R. I-168".

QUESTIONS PRESENTED

Important questions in the interpretation of the United States Shipping Act, 1916, as amended in 1961,[3] are presented here that have not heretofore been decided by this Court. Most of these questions involve, as well, critical, and novel, interpretations of the Administrative Procedure Act, and as such present issues of far-reaching significance to the entire field of federal administrative law. The questions are:

1. Under a federal statute that requires each contract of a class to be filed with an administrative agency, and which directs the agency, "after notice, and hearing, by order, [to] permit the use" of each such contract unless the agency finds that the contract does not comply with requirements of the statute, may the agency, without findings, publish a novel form of contract inconsistent with the statute and order it used "to the exclusion of any other contract"?

2. Where an administrative agency is authorized by statute to act only "after notice and hearing" and only "by order", may the agency act by general rule instead? Does the imposition of "an unusually heavy burden upon the Commission"[4] support its resort to general rule-making, not authorized by statute, in lieu of the adjudication that is expressly required by statute?

3. Where an administrative agency has held a hearing, after notice, "with issues limited to such matters as were there presented," may the agency thereafter,

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[3] 46 U.S.C.A. 813a, 75 Stat. 762.

[4] Opinion of the Court below [R. I-177; App.B, p. 10].

without notice, "abandon" the adjudicatory proceeding and "promulgate rules [to] establish the substance of approved contracts"?[5]

4. Where a federal statute requires "notice and hearing", may an administrative agency "look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise"?[6]

5. Is the statutory function of the Federal Maritime Commission under Section 14b of the Shipping Act, 1916, as amended (46 U.S.C. §813a), governed by Section 5 of the Administrative Procedure Act, as adjudication, or Section 4, as rule making? If the latter, may the agency validly make such rules without "any notice whatsoever",[7] or must the proceedings nevertheless be governed by Sections 7 and 8 of the Administrative Procedure Act?

6. Where a federal statute prescribes the substance of private contracts in specific detail, may an administrative agency modify the statutory terms under a delegation of authority to prescribe additional contract provisions "not inconsistent" with the statutory provisions?

7. Is the constitutional protection against deprivation of private property without due process of law violated by an agency order changing the terms and substance of private contracts, without statutory, or any, findings?

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[5] *Ibid.* [R. I-180, 181; App.B, pp. 13, 14].
[6] *Ibid.* [R. I-179; App.B, p. 12].
[7] *Ibid.* [R. I-180; App.B, p. 13].

STATUTES INVOLVED

The statutory provisions involved are Sections 14b and 22 of the Shipping Act, 1916, 75 Stat. 762 and 39 Stat. 736, 46 U.S.C. §§813a and 821; Section 3 of Public Law 87-346, 75 Stat. 764; and Sections 2, 4, 5, 7, and 8 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§ 1001, 1003, 1004, 1006 and 1007. All are printed in Appendix A hereto.

STATEMENT OF THE CASE

These cases came to the Court of Appeals to review two orders of the respondent Federal Maritime Commission. Jurisdiction in the Court below was provided by Section 1034 of Title 5, United States Code.

The cases have their roots in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), and the subsequent enactment in 1961 of amendments to the United States Shipping Act, 1916, designed to reverse *Isbrandtsen*. (Public Law 87-346, 75 Stat. 762). Section 14b, added to the Shipping Act by Public Law 87-346, is the governing statute here (46 U.S.C. §813a).

Petitioners are two associations, commonly called "conferences", of "common carriers by water in the foreign commerce", as that term is defined in Section 1 of the Shipping Act, 1916.[6] The conference members, viz., steamship lines, are voluntarily associated together to maintain uniform freight rates in international commerce under the

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[6] 46 U.S.C. §801.

statutory exemption from the Sherman Act provided in Section 15 of the Shipping Act.[9]

The orders here under review are two of twenty-two identical orders served by the respondent Commission on March 30, 1964, together with an omnibus Report, entitled "The Dual Rate Cases", also served that date. The Report purported to be the "final decision" in twenty-two separate, adjudicatory cases.[10]

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1. BACKGROUND—THE ISBRANDTSEN CASE AND THE CONGRESSIONAL RESPONSE.

The underlying subject matter is the so-called "dual rate" system of tying contracts between conference steamship lines and their customers, shippers of cargo in foreign trade.

In *Isbrandtsen, supra,* this Court held one such "dual rate" system unlawful under Section 14 of the Shipping Act. Congress responded to *Isbrandtsen* on August 12, 1958, less than three months after the decision, with passage of moratorium legislation, P.L. 85-626, 72 Stat. 574, specifically reversing the effect of the *Isbrandtsen* decision.[11] At the same time, three separate committees of Congress commenced studies of the conference system of rate-making in foreign trade and the "dual rate system"

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[9] 46 U.S.C. §814.

[10] There were sixty-one contract forms, called "dual rate contracts", filed with the Commission pursuant to Section 3 for approval under Section 14b of the statute. Through consolidation by consent of the parties, these sixty-one adjudicatory cases were reduced to twenty-two.

[11] See Sen. Report No. 860, 87th Cong., 1st Sess., p. 9 (1961).

of tying contracts in particular. The moratorium was later extended to complete the Congressional studies.[12]

On October 3, 1961, the President signed into law Public Law 87-346. The Act's purpose was stated in its preamble:

> "to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees . . . ."

The new statute amended Section 14 of the Shipping Act —the basis of *Isbrandtsen*—by the addition of a new Section 14b, to require:[13] (1) that all dual rate contracts contain eight specific provisions enumerated in the statute; (2) that existing contracts be amended to include the eight statutory requirements, and be filed with the Commission by March 3, 1962; and (3) that the Commission "by order" permit the use of each contract, so filed, if the Commission determined that it complied with the new statute, by April 3, 1963.[14] A catch-all clause was included in the new Section 14b to authorize the Commission to add other contract terms "not inconsistent" with those prescribed in the statute. (Section 14b(9)). A new Commission was then created[15] and the new statute became effective on October 3, 1961. Petitioners duly

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[12]Public Law 86-542, 74 Stat. 253; Public Law 87-75, 75 Stat. 195.

[13]In conjunction with the transitional Section 3 of P.L. 87-346.

[14]Extended at the request of the Federal Maritime Commission to April 3, 1964.

[15]The latest in the succession of agencies entrusted with the administration of the Shipping Act, the present Commission was established on August 11, 1961, pursuant to Reorganization Plan No. 7 of 1961 (26 F.R. 7315).

amended their contract forms to comply with the new statute and filed them for approval under Section 14b.

2. THE COMMISSION'S INTERPRETATION OF SECTION 14b.

When sixty-one dual rate contract forms, including Petitioners', were filed with the new Commission on or before the statutory due date of March 3, 1962, for the Commission's determination of their compliance with the requirements of Section 14b, the new Commission initially reacted with the creation of a uniform type of contract which was published in the Federal Register as a "proposed general rule".[16] The Commission's proposed uniform contract differed from all existing industry contracts in form, size and substance, and was abandoned, together with the entire rule-making docket, after causing "a storm of protest".[17]

The Commission then served notice of sixty-one separate hearings, to be held on each individual contract under authority of Section 22 of the Shipping Act, 46 U.S.C. §821, each looking toward the administrative determinations called for by Section 14b [R. II-6; IV-382].[18]

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[16]F.M.C. Docket 983, "Rules Governing Contract Rate Systems in the Foreign Commerce of the United States;" Notice of Proposed Rulemaking published in the Federal Register of March 21, 1962; Notice of Proposed Final Rules and Uniform Agreement published January 3, 1963.

[17]See App.B, p. 5. See also 3 S.R.R. at 717.

[18]Pacific Coast European Conference's proceeding was designated Docket 1007; that of the Pacific Coast River Plate Brazil Conference was designated Docket 1057 and, on consent of the parties, was consolidated with Dockets 1003, 1092, et al., involving substantially the same carriers in adjacent South American trades. Others of the sixty-one cases were similarly consolidated into an aggregate of twenty-two proceedings; see note 10, *supra*.

Separate hearings were held in each case, at the conclusion of which each Hearing Examiner issued an Initial Decision in accordance with Section 8 of the Administrative Procedure Act, 5 U.S.C. §1007. Each Examiner sustained the contract before him with minor changes which Petitioners in each case accepted [R. II-179; IV-611].

While the hearings were in progress, the Commission announced the "severance" of five "major issues" said to be common to all hearings [R. X-853]. These Petitioners objected [R. X-861],[19] unsuccessfully [R. X-896]. The issues "severed", for the alleged "convenience" of certain intervenors, were then committed to a "Panel of Five Examiners" for separate disposition in a consolidated proceeding called Docket 1111. Docket 1111 was labelled "Adjudication of Major Issues". An "Initial Decision" was subsequently rendered by the Panel of Examiners [R. X-898].

Section 3 of P.L. 87-346 afforded the Commission two years[20] to act on the contracts filed under Section 14b, i.e., until April 3, 1964. On March 27, 1964, the Commission suddenly, and without notice, announced that it had consolidated all twenty-two pending cases into a single one for final decision, and, simultaneously, released to the public press an omnibus report called "The Dual Rate Cases" which, three days later, the Commission served upon Petitioners, together with the orders here under review. Identical orders, with the accompanying report,

[19]The Commission's Rules of Practice provide that proceedings will be consolidated only upon consent of the parties.

[20]Originally one year, but extended an additional year at the Commission's request.

were similarly served upon all sixty-one conferences throughout the foreign commerce of the United States.

Although ostensibly "approving" each of the sixty-one diverse contracts filed with it, what the Commission actually did was disapprove each contract filed, since the identically-worded orders commanded the use of a newly-devised, theretofore unrevealed "standard uniform contract", "to the exclusion" of all others [R. XII-1210; XII-1217].[21] The Commission's omnibus report ignored the individual hearing records before the Commission except casually to refer to them collectively, plus the consolidated Docket 1111, as "background" for the Commission's formulation of its newly announced "standard, uniform contract".

As correctly stated by the Court below, the Commission's "uniform" contract:

> "was not the contract considered by the examiner[s] in petitioners' proceedings. It contained provisions not specifically required by §14(b) and not discussed in the hearings had upon petitioners' proposed contracts."[App.B, pp. 6-7.]

Commissioner John S. Patterson issued a powerful dissenting opinion, objecting as a matter of law to the majority's arbitrary action in failing to pass upon each contract filed for approval, as required by Section 14b.[22] In his dissent, Commissioner Patterson individually considered the record and Initial Decision of the Presiding Examiners in each of the twenty-two adjudicatory cases, saying

[21]The orders, plus "uniform contracts," for these two Petitioners are included in the Supplemental Appendix.

[22]R. XII-1164; 3 S.R.R. commencing at 715.

that, in each case, the records required approval under the statutory standards of Section 14b, and as initially approved by the respective Examiners, although, in some instances, with certain minor modifications, not material here [see R. XII-1196-1209; 3 S.R.R. at 731-737].

In view of the statutory expiration date,[23] but four days from service of the omnibus report and orders, Petitioners despaired of relief from the Commission and on April 10, 1964, filed in the Ninth Circuit Court of Appeals their respective petitions for review, pursuant to the Review Act of 1950[24] [R. I-2].[25] Petitioners sought interlocutory relief, which was denied.[26]

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3. THE COURT OF APPEALS' AFFIRMANCE.

On February 3, 1964, the Court of Appeals issued a consolidated opinion in the captioned appeals.[27] In all but a minor portion, it sustained the actions of the Commission. In so doing, the Court invoked a theory at once wholly at odds with the theory of the statute and with the theory under which the Commission itself had purported

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[23]Section 15 of the Shipping Act provides a penalty up to $1000-a-day for violation of Section 14b (46 U.S.C. §814).

[24]5 U.S.C. §§1031 et seq. (1958).

[25]The Record as certified to this Court contains only the papers filed on behalf of Petitioner Pacific Coast European Conference; the petition for review filed by Petitioner Pacific Coast River Plate Brazil Conference was substantially identical to that of the European Conference, to which the Record reference pertains.

[26]*Cf. Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920), holding that interlocutory relief should have been granted in the face of similar monstrous, daily penalties. Accord: *Ex Parte Young*, 209 U.S. 123, 147-148 (1908).

[27]Together with the appeal of a third, newly-formed conference which, for reasons not here relevant, chose not to seek certiorari.

to act. The Commission acted throughout the proceedings under Sections 5, 7 and 8 of the Administrative Procedure Act. The Court sustained the Commission's action, however, as the formulation of agency rules under Section 4 of the Administrative Procedure Act, as:

> "a prospective determination of the standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met." [App.B, p. 11].[28]

Notwithstanding the fact that the statute clearly required a contract-by-contract determination, viz., "an adjudication as to whether those standards in a particular case had been met"—and, indeed, admitting that, "In each [case], the issue was whether the contract contained the provisions required by the new [amendment to the] Shipping Act"—the Court nevertheless held that the Commission should not be required to act upon each contract before it as,

> "it would have imposed an unusually heavy burden upon the Commission to require it to treat each contract individually . . . ." [App.B, p. 10].[29]

As authority for this radical departure from the statute's express commands, the Court lifted from the statute a

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[28]In the enactment of Section 14b in P.L. 87-346, Congress determined "the standards under which conferences were to be permitted to act in the future." It committed to the Commission only the duty to determine whether each contract filed met those legislative standards.

[29]This despite the facts that (a) the "heavy burden" had already been virtually discharged by the several Initial Decisions of the various Examiners, and (b) as already noted, the dissenting Commissioner had no trouble in "treat[ing] each contract individually" in his separate opinion.

small clause which it termed the "all-important proviso" of the statute, Section 14b(9). That clause, following eight specific requirements which Congress had laboriously fashioned, provided that dual rate contracts should also:

> "contain such other provisions not inconsistent herewith as the Commission shall require or permit".

In its Report, the Commission itself had *not* purported to act under this clause, except in a few isolated minor instances. The Commission simply took each of the eight detailed requirements of the statute, changed them radically and, as changed, put all together into a compulsory "standard form of contract".

Finally, although conceding that:

> "Petitioners could reasonably assume . . . that they were engaged in a hearing under §7 and §8 of the Administrative Procedures [sic] Act, with the issues limited to such matters as were there presented" [App.B, p. 13],

nevertheless, the Court held that it was proper for the Commission, at some later, undisclosed point, without notice of any kind, to "revert to general rule"[20] and, without more, to issue a binding "rule", in the guise of an "order", against Petitioners as to any and all matters which were, "*in subject matter*, dealt with in petitioners' adjudicatory dockets or in Docket 1111." [App.B, p. 13].[21]

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[20]The term "revert" referred to the Commission's "Proposed Rules" of 1962 (see note 16, *supra*) which the Court itself acknowledged to have been "abandoned".

[21]The proceedings in Docket 1111 produced a massive record of opinion testimony. Almost every conceivable matter was "dealt with" in some degree, but not as to these Petitioners, and no rules were considered at any point in the hearings.

As noted above, the Court of Appeals remanded Petitioners' cases to the Commission but, in so doing, the Court fashioned the Commission's subsequent actions. Thus guided, the Commission promptly, on June 24, 1965, reissued its original orders as "Orders on Remand", with only two insignificant clauses deleted from the "uniform contract" and simultaneously promulgated as "Proposed Rules". Thus, the Commission has demonstrated that it interprets the lower Court's decision to authorize both orders and rules in the same proceedings, for the same effect.

In the meantime, while this litigation has been pending, Petitioners have continued in effect and operation their own dual rate contracts of more than a quarter century's endurance with ten thousand Pacific Coast exporters.

REASONS FOR GRANTING WRIT

First, to these Petitioners, engaged in foreign trade under extremely competitive conditions from ships of all nations and under a policy both national and international that recognizes the doctrine of "freedom of the seas", an effective tying arrangement with exporters is the only available means of preventing destructive, percentage-differential rate-cutting. The new statute enacted after the *Isbrandtsen* decision declared a national policy to permit:

> "fair and effective dual rate contracts."

The form of contract ordered by the Commission is neither fair nor effective. Such contracts, calling for lower rates

from the carriers to contracting shippers, are executed by the former only to secure exclusive patronage and thereby meet non-conference raiding of established trade routes. The Commission's "standard uniform contract" orders Petitioners to reduce all freight rates by 15% for contracting shippers, but authorizes contracting shippers to patronize any other vessel whenever available simply by "transferring the legal right to select the carrier to any person". As the lower Court aptly said, the Commission did not approve any contract at all; it issued a new regulation [App.B, p. 7].

The Chairman of the Commission has recently, on June 30, 1965, admitted in testimony before a Congressional Committee that seven of the conferences involved in "The Dual Rate Cases" have elected to abandon altogether the use of dual rate contracts rather than substitute the mandatory "standard form" devised by the Commission. These Petitioners will be faced with the same Hobson's choice if the writ is not granted.

Secondly, the Court of Appeals erred in its interpretation of Section 14b. There are important decisions of this Court governing both the procedure and substance of administrative actions that will require a reversal of the lower Court if the writ is granted. Section 14b(9) of the Shipping Act, upon which the Court of Appeals rested what it called the Commission's "broad rule-making powers", closely resembles Sections 8c(5) and 8c(7)(D) of the Agricultural Marketing Agreement Act of 1937,[32] which was before this Court in *Brannan v. Stark*, 342 U.S. 451 (1952). Both statutes first set forth a comprehensive

[32] 50 Stat. 246, 7 U.S.C. §§601 et seq.

list of specifically required contract terms prescribed by Congress after careful study and debate. Both authorize additional requirements by administrative action provided they are "not inconsistent" with the statutory standards.

In the *Brannan* case, this Court decided that subsection 8c(7)(D) of the Agricultural Marketing Agreement Act, which the Court recognized as a mere "catch-all clause", did not authorize the Secretary of Agriculture to add provisions to agreements for the marketing of milk in the Boston area that were inconsistent—as the Court had found—with the specific requirements of the statute itself. The Court said, of the catch-all clause:

> "The Secretary claims authority for the provisions in question is given by the last paragraph of this omnibus subsection, a paragraph authorizing the inclusion of auxiliary provisions 'incidental to . . . the terms and conditions specified in subsections (5), (6), and (7).' Yet it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe." 342 U.S. at 462-463.

The above words of this Court should apply equally here, yet the Court of Appeals refused to consider whether the substance of the Commission's orders was inconsistent with the eight specific requirements of Section 14b of P.L. 87-346. We consistently urged the Court to consider this critical question. Instead, the lower Court termed the catch-all clause an "all-important proviso" that subsumed entirely the rest of Section 14b. Under the proviso,

the Court held that the Commission had been delegated a "choice" between:

> "general rule and uniform contract or of proceeding on a contract-by-contract basis in a series of adjudicatory proceedings to determine the sufficiency of the individual contracts under §14(b), with the Act, unimplemented by rule, forming the applicable standard." [App.B, p. 12].

No such "choice" appears anywhere in the statute. The "applicable standard" in the statute is the only standard. No provision for "implementation" of the statutory standard appears in the statute nor was any implementation intended by Congress. See Report of the Senate Commerce Committee on H.R. 6775, which became P.L. 87-346, saying:

> "Your committee believes that if the eight specific requirements set forth in its amendments are met by the proposed contract, it should be entitled to Commission approval unless the Commission finds that the contract would be detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair. We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair." Sen. Report No. 860, 87th Cong., 1st Sess., p. 23 (1961).

Although Section 14b requires "notice and hearing" in each case, *on all* questions under that section, the lower Court held that the "catch-all clause" of Section 14b(9) authorized the Commission to:

"look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise." [App.B, p. 12].

On the contrary, this Court has held:

"[*E*]*xpertise* is not sufficient by itself. Findings supported by substantial evidence are required." *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81, 93 (1961).

In answer to Petitioners' argument that the Commission's orders commanding them to use the Commission's contract "to the exclusion of all others", though made without statutory findings against Petitioners' own contracts, amounted to the abrogation of Petitioners' contracts without due process of law, the lower Court answered only that,

". . . although in contract form, what the Congress and the Commission have imposed upon the conferences is simply regulation. The Conferences have no right, constitutional or otherwise, to exemption from such regulation." [App.B, p. 7].

The Court refused, despite our petition and insistent argument, to consider the reasonableness of the "regulations".[33]

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[33]Congress, at least, preserved to Petitioners their existing contracts if the eight statutory provisions were included within 6 months from the enactment of P.L. 87-346—as this Court below itself recognized; see App.B, pp. 4-5. It was the Commission that, taking advantage of Petitioners' economic need for the contracts and the Commission's approval, determined to manipulate the contracts so as to impose new regulations upon Petitioners, different from, as well as in addition to, the statute. Petitioners do not object to regulation, but do question the authority of the Commission to impose unreasonable regulations in the guise of "approving" Petitioners' contracts.

If, as the Court of Appeals held, the "catch-all clause" of Section 14b(9) makes the Commission's "regulation" conclusive as to the sufficiency of the ordered contract provisions, then Section 14b(9) should be held unconstitutional. *Ex Parte Young,* 209 U.S. 123, 147 (1908); *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38 (1936); *Oklahoma Operating Co. v. Love,* 252 U.S. 331 (1920).

The reasoning of the lower Court will establish a novel doctrine of administrative law, if not reversed by this Court. The keystone of the lower Court's decision was stated:

> "As to the Commission's method of consolidating hearings upon issues and filing a consolidated report, we note that there were approximately sixty different conference contracts submitted for approval. In each, the issue was whether the contract contained the provisions required by the new Shipping Act. Under these circumstances it would have imposed an unusually heavy burden upon the Commission to require it to treat each contract individually despite the existence of common questions." [App.B, pp. 9-10].

Solely for the Commission's convenience, the Court created the right of an administrative agency to flip-flop back and forth between adjudication and rule-making, in one and the same proceeding, without notice at any time to Petitioners. Such procedure confounds the objectives of the Administrative Procedure Act which is "based upon a dichotomy between rule-making and adjudication".[34]

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[34] *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 14; see also p. 15.

"Countless decisions of this Court, as well, are flatly opposed to this result, holding that where Congress uses the words "after notice and hearing", as in Section 14b, it intends, and commands, adjudication and a decision based solely on the record. See, e.g., *Chicago Junction Case*, 264 U.S. 258, 265 (1924); *Morgan v. United States*, 298 U.S. 468, 480 (1936).

Moreover, this Court has been equally emphatic in condemning the very sort of empty justification, born of expediency, which the Court here created for the respondent Commission—viz., that to have "require[d] it to treat each contract individually" "would have imposed an unusually heavy burden upon the Commission". Clearly, the size of the burden upon the Commission is a legislative matter. The statute calls for Commission action on each contract. Viewing the right of private parties to a decision limited to the hearing record as "one of the 'rudiments of fair play'," this Court has stated:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored". *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 305 (1937).

Further, it was not until the parties were in the Court of Appeals that the Commission's appellate counsel, for the first time, sought to justify the Commission's orders on the theory that they were—at least in part—really "general rules".[35] The Court granted that:

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[35]Compare *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962), and *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 13 L. Ed. 2d 951, 955 (1965), condemning such reviewing-court acceptance of "appellate counsel's post hoc rationalization for agency action".

> "Petitioners could reasonably assume from this action [viz., service of notice and hearing] that they were engaged in a hearing under §7 and §8 of the Administrative Procedures [sic] Act, with the issues limited to such matters as were there presented." [App.B, p. 13].

Nevertheless, the Court then went on to say that the Commission could, despite Petitioners' "reasonable assumption", "revert to general rule", provided it gave to Petitioners "notice of its intention and an opportunity to participate in the making of rules". So far, so good, but thereupon the Court held:

> "such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in petitioners' adjudicatory dockets or in Docket 1111." [App.B, p. 13].

But, as the Court acknowledged earlier in its decision:

> "The form of contract attached to the order was initiated by the Commission pursuant to the findings and conclusions of *The Dual Rate Cases* and was not the contract considered by the examiner in petitioners' proceedings. It contained provisions not specifically required by §14(b) and not discussed in the hearings had upon petitioners' proposed contracts." [App.B, p. 7].

In *Morgan v. United States*, 304 U.S. 1 (1938), this Court twice declared the law contrary to the Court of Appeals' holding here, saying:

> "Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be

heard upon its proposals before it issues its final command." 304 U.S. at 18-19, 25.

Petitioners were never advised of the Commission's proposals, or any of them, until served with the final orders.

In summation, the Court's opinion, recognizing that the Commission's orders could not be sustained as the adjudication which the statute required, invented a new theory of "approval by off-the-record rule-making". To do so, however, it necessarily created radical, and unsustainable, "new principles" of administrative law, completely at odds with decisions of this Court and with the Congressional enactments. Review should be taken in this Court's exercise of its supervisory authority over the federal system, in order to correct these outlandish, conflicting "principles," and to reestablish the field of administrative law in a meaningful perspective.

Finally, this Court should take review to resolve an inter-Circuit conflict between the Ninth Circuit and that of the District of Columbia, represented by this case and by the latter Court's recent decision in *Aktiebolaget Svenska Amerika Linien, (Swedish-America Line) v. Federal Maritime Commission,* No. 18,554, decided June 10, 1965, not yet officially reported.

The *Svenska* case concerned Section 15 of the Shipping Act; this case concerns Section 14b. But Section 14b was carefully patterned after the earlier enacted Section 15, and the two cases involved interpretation of the same statutory language.[36] As a comparison readily shows, both

[36]The penalties for violating both Sections 14b and 15 are set forth only in Section 15. See Appendix A, for a reproduction of both sections.

sections require the entry of an "order", after "notice and hearing"; moreover, both provide for mandatory agency approval of each agreement "*unless*" there are affirmative "findings" that an agreement, as submitted, contravenes certain enumerated general "public interest" standards: that is, that it not be "found" to be "detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair as between" certain specified groups.[37] The Presiding Examiners here expressly found that Petitioners' contracts were *not* violative of any statutory requirement and the Commission did not disturb these findings.

In *Svenska*, the Maritime Commission had, in precisely the same fashion, arbitrarily overruled the Examiner's Initial Decision approving certain carrier agreements. The Commission ordered "modifications" (or, "other provisions")[38] without supporting findings.[39] The District of Columbia Court was swift and unequivocal in its reversal. Finding neither of the Commission's two "modifications" supported by findings on the record, the Court held:

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[37]Section 15 adds a fourth standard: "or to be in violation of this Act;" presumably this is implicit in Section 14b, as well.

[38]Section 14b has the same meaning. See Commissioner Patterson's dissenting opinion in the instant "Dual Rate Cases":

> "If the contract fails [to satisfy the express statutory tests], the Commission's order may require other provisions as authorized in (9) of Section 14b or the Commission may modify by its order in accordance with Section 3 of P.L. 87-346. Before modifying or requiring something else, however, the Commission must show how the applicant's contract has failed to meet the measure." [3 S.R.R. at 716].

[39]For the same reasons as here, Commissioner Patterson (joined by Commissioner Day) dissented in *Svenska*.

"The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four[40] ways set out in the section by Congress.

• • •

"In the absence of such a specific finding, the [agreement] is, by direction of Section 814 [§ 15], to be approved".

The two cases, interpreting precisely the same statutory scheme as set forth in two adjacent statutory provisions, cannot be reconciled. There is nothing in law or logic which permits disparate treatment of the two comparable sections.[41] This Court should grant review to resolve the conflict.

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[40]See note 37, *supra*.

[41]Indeed, even the Ninth Circuit has heretofore held that the language of Section 15 required an adjudicatory proceeding; see *Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Commission*, 310 F.2d 606 (9th Cir. 1962). The only reason it recited in the instant case, to distinguish that earlier holding, was that "there all parties agreed that the proceeding was adjudicatory"(!); see App.B, p. 11, n. 10. All parties here also agreed that the proceedings were adjudicatory—at least until the appellate proceedings. See text at note 35, *supra*.

CONCLUSION

The statutory policy of Public Law 87-346, "to authorize" "effective and fair dual rate contracts", has been completely frustrated by the Commission's failure and refusal to permit the use of contracts amended by the parties to comply with Section 14b of the Act. Both that policy and the entire administrative process have been further confounded by the lower Court's irrational affirmance. Accordingly, and for the reasons herein stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GRAHAM JAMES & ROLPH
LEONARD G. JAMES
ROBERT L. HARMON
F. CONGER FAWCETT
Attorneys for Petitioners.

Dated: September 20, 1965.

(Appendices A, B and C Follow)

Appendix A

STATUTES INVOLVED

Shipping Act, 1916, as amended, 46 U.S.C. §801 et seq.:

Section 14b, 46 U.S.C. §813a:

Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the

contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary

rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is

granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.

Section 15, 46 U.S.C. §814:

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement,

or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall aprove all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide reve-

nue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 22, 46 U.S.C. §821:

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

Public Law 87-346, 75 Stat. 726 et seq.:

Section 3, 75 Stat. 764:

Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

Administrative Procedure Act, 5 U.S.C. §§1001 et seq.:

Section 2, 5 U.S.C. §1001:

DEFINITIONS: As used in this Act—

(a) *Agency.*—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to

repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: . . .

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) *Rule and rule making.* "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or account-

ing, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) *Order and adjudication.*—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) *License and licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) *Sanction and relief.*—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirements, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recog-

nition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) *Agency proceeding and action.*—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Section 4, 5 U.S.C. §1003:

RULE MAKING: Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.* General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which

the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective dates.*—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5, 5 U.S.C. §1004:

ADJUDICATION: In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

(a) *Notice.*—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) *Procedure.* The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement,

or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) *Separation of functions.*—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) *Declaratory orders.*—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7, 5 U.S.C. §1006:

HEARINGS: In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) *Presiding officers.*—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) *Hearing powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause deposi-

tions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.*—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record

for decision in accordance with section 8, and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8, 5 U.S.C. §1007:

DECISIONS: In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall intially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except

that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusion. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Appendix B

OPINION AND JUDGMENT OF THE COURT BELOW

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC COAST EUROPEAN CONFERENCE AND MEMBERS THEREOF, *Petitioners*, vs. UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION, *Respondents*.	Nos. 19,237, 19,238, 19,239
LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE, *Petitioners*, vs. FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	
PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE AND ITS MEMBER LINES, *Petitioners*, vs. UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION, *Respondents*.	

[February 3, 1965]

On Petition for Review of Order of the Federal Maritime Commission

Before: HAMLEY, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge:

The orders here under review[1] are two[2] of twenty-two substan-

[1]Pursuant to the Review Act of 1950, as amended in 1958, 5 U.S.C. §§1031-1042 (1958).

[2]One of the orders relates to two petitioners: Latin America/Pacific Coast Conference and Pacific Coast River Plate Brazil Conference (FMC Docket Nos. 1092 and 1057, respectively).

tially similar orders issued by the Federal Maritime Commission pursuant to its report entitled *The Dual Rate Cases.*

The orders are here attacked as in excess of the Commission's authority as bestowed by §14(b) of the Shipping Act of 1916, as amended, 46 U.S.C. §813a (Supp. V, 1964)[3] (later discussed),

[3]"Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission'), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which

and contrary to the intent of that section; and, through lack of notice and hearing, as in violation of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§1001-1011 (1958).

Petitioners are three of some sixty steamship conferences affected by *The Dual Rate Cases* and orders entered pursuant to that report. These conferences are rate-fixing associations of carriers, all of whom are engaged in the water-borne commerce of the United States and whose association is permitted by §15 of the Shipping Act of 1916, as amended, 46 U.S.C. §814 (Supp. V, 1964), subject to approval of their agreements of association by the Federal Maritime Commission.

These proceedings involve those provisions of the several agreements of association which permit the fixing of "dual rates": the granting by a conference of preferential rates to shippers who have agreed with the conference to patronize it exclusively.

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spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term 'contract shipper' means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section."

Prior to the enactment of the legislation with which we are here concerned the lawfulness of dual rate contracts had long been questioned as contrary to established antitrust policy. In 1958 the Supreme Court, in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), had held such a contract to be in violation of §14 Third of the Shipping Act of 1916, 39 Stat. 733 (1917), and had thus cast doubt on the validity of such arrangements. Congress sought to clarify and remedy the situation. After three years of study Public Law 87-346, 75 Stat. 762 (1961), was enacted October 3, 1961. Its declared purpose was "• • • to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees • • •." By §3, interim validity of existing dual rate agreements was provided.

The meat of the Act was in what has become §14(b) of the Shipping Act of 1916, as amended, 75 Stat. 762 (1961), 46 U.S.C. §813a (Supp. V, 1964), which provides that the Federal Maritime Commission shall permit dual rate agreements,

> "• • • unless the Commission finds that the contract • • • will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors."

The authority of the Commission to permit such contracts was limited by requiring that the contracts in eight specified respects meet the congressional judgment as to what they should include. Listed as specification Nine was the requirement that a contract shall contain "• • • such other provisions not inconsistent herewith as the Commission shall require or permit." Thus was imposed upon the Commission the task of reviewing and revising all agreements under which the conferences were operating with respect to dual rates.

The provisions for interim validity of existing dual rates contracts set forth a schedule for bringing those contracts into line with §14(b)'s requirements. The conferences, within six months, were to file with the Commission their proposals as to how their existing contracts should be amended to meet the new requirements. Thereafter the existing contracts as so amended should be

valid for a further period of one year, during which period "the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act." By subsequent enactment the time allowed the Commission (and the period of interim validity) was extended to April 3, 1964, 77 Stat. 5 (1963).

These petitioners duly submitted their proposed amendments to the Commission before expiration of the six-month period specified.

On March 21, 1962, the Commission gave notice by publication in the Federal Register, 27 Fed. Reg. 2647 (1962), that pursuant to the provisions of the Shipping Act it was considering the promulgation of certain rules and regulations governing the use of contract rate systems as authorized by §14(b).

On January 3, 1963, the Commission published in the Federal Register its "Notice of Proposed Final Rules and Uniform Agreement." Reciting its earlier notice the Commission stated:

> "Having given due consideration to the comments of interested persons filed in response to said notice the Federal Maritime Commission hereby gives notice that it is considering the promulgation of final rules in this matter. These proposed final rules are as follows:" 28 Fed. Reg. 74 (1963).

There followed a proposed uniform contract for all conferences.

A storm of protest arose from the conferences over this proposed resort to a uniform contract. The conferences contended that the Commission's function under §14(b) was to conduct individual hearings on the amendments as proposed by the individual conferences to determine whether those amendments conformed to the requirements of that section.

The Commission acceded to conference demands. On April 9, 1963, it entered its "Order of Investigation and Hearing" respecting Pacific Coast European Conference (typical of the orders respecting the individual conferences) for hearing before an examiner upon the amended contract as proposed by that conference.[4]

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[4]The order provides in part:

"The Commission has before it the approval, disapproval, modification or cancellation of the above amended exclusive patronage (dual rate) contract.

THEREFORE, IT IS ORDERED, That pursuant to sections 14(b) and 22 of the Shipping Act, 1916, an investigation and hearing is hereby

Subsequently, on the petition of various shippers and shipper associations, certain so-called "major issues" were severed from most of the proceedings on the individual contracts and were heard before a panel of five examiners in a proceeding assigned Commission Docket No. 1111. The Commission's order of investigation and hearing in this docket stated that the proceeding was instituted in order to lessen the burden of shippers (who might be signatories to dual rate contracts with a number of conferences, and who might otherwise have to participate in substantially every proceeding before the Commission), and for the purpose of achieving "optimum uniformity" in contract provisions.

On December 3, 1963, petitioners' examiner rendered his initial decision. Subject to certain specified modifications, and subject to the rulings in Docket 1111, he concluded that the proposed contract met the requirements of §14(b) and was not detrimental to the commerce of the United States, contrary to the public interest or unjustly discriminatory or unfair and should be permitted in use in foreign commerce by the conference.

On March 27, 1964, the Commission handed down its report entitled *The Dual Rate Cases*, together with orders in petitioners' proceedings to the effect "that the agreement submitted to the Commission by the respondents in the above proceedings are hereby approved in the form attached to this order" and providing that the attached form of order should become effective April 4, 1964, "to the exclusion of any other terms and provisions." The report and order were served on petitioners on March 30, 1964.

The form of contract attached to the order was initiated by the Commission pursuant to the findings and conclusions of *The Dual Rate Cases* and was not the contract considered by the examiner in petitioners' proceedings. It contained provisions not

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instituted to determine whether the form of said exclusive patronage (dual rate) contract meets the requirements of section 14(b), will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and whether the use of said form of exclusive patronage (dual rate) contract should be permitted or said contract should be ordered modified in any respect whatsoever pursuant to section 14(b)."

specifically required by §14(b) and not discussed in the hearings had upon petitioners' proposed contracts.

Petitioners assert that they were thus required, on four days' notice, to commit themselves by agreement to grant concessions to contract shippers above and beyond those called for by the Shipping Act, as to which there has been no hearing in their proceedings, and which in fact were, as to them, unnecessary and prejudicial to the point of unfairness.

Petitioners did not seek rehearing before the Commission pursuant to its Rule 16, 18 Fed. Reg. 3726 (1953), 46 C.F.R. §201.261,[5] upon these protested contractual provisions. Instead they promptly brought this proceeding for judicial review, not primarily attacking the substance of the contracts approved by the Commission but rather the procedures by which they were formulated.

1. Petitioners contend that their rights under their outstanding contracts constituted property rights protected by the Fifth Amendment; that Congress through enactment of §14(b) and the Commission by imposing a mandatory agreement upon the conference without their consent have deprived them of their right freely to contract about their business affairs. Specifically, petitioners contend that their contracts constitute property which the Commission is "taking" without due process.

It is obvious, however, that although in contract form, what the Congress and the Commission have imposed upon the conferences is simply regulation. The conferences have no right, constitutional or otherwise, to exemption from such regulation. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). They have no right, constitutional or otherwise, to persist in a course which Congress has now found to be discriminatory to shippers and violative of the antitrust policies.[6]

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[5]This Rule provides, in part, as follows:
"Upon petition or its own motion, the Board [now Commission] may at any time after reasonable notice, reopen any proceeding under these rules for rehearing, reargument, or reconsideration and, after opportunity for hearing, may alter, modify, or set aside in whole or in part its report of findings or order therein if it finds such action is required by changed conditions in fact or law or by the public interest."

[6]It should be noted that petitioners are required to use the contracts here at issue only if they wish some of their practices to be exempted

2. Petitioners contend that the Commission has not proceeded in accordance with §14(b). They point to the statutory provision that the Commission *shall permit* the use by a conference of *any contract* providing dual rates *unless* the Commission finds the contract to be detrimental to commerce or contrary to public interest or unjustly discriminatory or unfair. They assert that the Commission has not so found as to their proposed contract, and that the hearing examiner expressly found to the contrary. They contend that the congressional intent, disregarded by the Commission, was to authorize conferences to continue under their *existing* contracts without interruption, provided only that they be amended to the extent required.

But petitioners overlook §14(b)'s all-important proviso—"provided that the contract * * * expressly * * * (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit."

There was thus plain authority in and direction to the Commission to give consideration to and to require agreement on other matters than those occurring to Congress.[7] Such matters would normally be initiated by the Commission and its reference to an examiner of petitioners' proposals can hardly be construed as a delegation or a surrender of that function.

As a deference owed to existing contracts, the Commission had made it plain from the outset that it regarded uniformity of contract, a counterbalancing consideration, as desirable in the public interest. Legislative history demonstrates that such was the

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from the provisions of the antitrust laws. If they do not wish to be so exempted, they need not, of course, accept the contract promulgated by the Commission.

[7]For example, the Senate Commerce Committee Report on the bill stated:

"This broad rulemaking mandate [of §9] should move the Commission, for example, to deal with three matters which the National Industrial Traffic League has urged upon us and upon the House Committee. While we would be strongly opposed to trying to freeze into legislation the solution to any of these three problems, they present matters which it seems to us the Commission is equipped to an [sic] should deal with under its rulemaking function." *Index to Legislative History of the Steamship Conference/Dual Rate Law*, S.Doc.No. 100, 87th Cong., 1st Sess. 213 (1962).

view of Congress as well.[8] While strict uniformity did not result due to difference of circumstances affecting the different conferences, it was cetrtainly within the authority of the Commission, and, as we view it, wholly consistent with the spirit of the Shipping Act of October 3, 1961, to seek uniformity to the extent possible.

As to the Commission's method of consolidating hearings upon issues and of filing a consolidated report, we note that there were approximately sixty different conference contracts submitted for

[8]As is discussed in the Commission's report, the Committee on the Merchant Marine and Fisheries of the House of Representatives, in its report on the bill which ultimately became Public Law 87-346, made it clear that the statute should result in more or less uniform dual rate contracts. The Committee said:

"It is the expectation of the committee that a standard form of contract to be utilized by all conferences will be approvad by the Board [now Commission] with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problem of shippers, who, of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions." Senate Committee on Commerce, *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, S.Doc.No. 100, 87th Cong., 1st Sess. 120 (1962).

This objective was further emphasized by the Antitrust Subcommittee of the Committee on the Judiciary which played a major role (see *Index to the Legislative History of the Steamship Conference/Dual Rate Law, supra*, 117) in the formulation of Public Law 87-346 when it subsequently said:

"The Federal Maritime Commission should establish minimal standards for dual-rate contracts beyond those set forth in Public Law 87-346 and should devise and publish a basic form contract to be used by all conferences." H.Rept. No. 1419, 87th Cong., 2d Sess., page 390 (1962).

Petitioners argue that the House Reports should be paid little heed because the House-passed bill was amended in certain regards in the Senate. These amendments, however, had no bearing upon the need for uniform contracts. If anything, they strengthened the statutory position of the Commission from what it had been under the House-drafted bill. Thus the report of the House managers of the bill, after the Senate-House conference, stated that:

"The House authorized the Commission to make rules and regulations necessary under specified sections of the act: the Senate amended by broadening the authority to include the entire act. The House receded from its position." *Index to the Legislative History of the Steamship Conference/Dual Rate Law, supra*, 445.

approval. In each, the issue was whether the contract contained the provisions required by the new Shipping Act. Under these circumstances it would have imposed an unusually heavy burden upon the Commission to require it to treat each contract individually despite the existence of common questions.

We conclude that the Commission's procedures were not contrary to §14(b).

3. Petitioners attack the procedure followed by the Commission as violative of the Administrative Procedures Act in certain respects. They make the following contentions:

(a) Neither the order nor the report *The Dual Rate Cases* contain findings, conclusions or reasons or basis for the Commission's decision, contrary to the requirements of §8(b) of the Administrative Procedures Act, 5 U.S.C. §1007(b) (1958).

(b) Under §7(d) of the Administrative Procedures Act, 5 U.S.C. §1006(d) (1958), the transcript of testimony and exhibits in petitioners' proceedings should have constituted the exclusive record for decision of the Commission. By including in its approved contract clauses other than those under consideration in petitioners' proceedings, the Commission has gone beyond this record.

These sections of the Administrative Procedures Act relate primarily to adjudicatory proceedings rather than rule making proceedings. It is clear that in promulgating *The Dual Rate Cases* the Commission was proceeding in the area of rule making.

"Rule" and "rule making" are defined as follows in §4(c) of the Administrative Procedures Act, 5 U.S.C. §1001(c) (1958):

> "'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

Petitioners contend that §14(b) did not permit the Commission to proceed by general rule; that it was required by the Shipping Act to proceed on a contract-by-contract basis. For the reasons already discussed we cannot agree.[9]

In our judgment the terms and conditions under which dual rates might be charged were the subject of rule making. In this area the Commission was acting in implementation of §14(b); its action was legislative rather than judicial in character. It was a prospective determination of the standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met.[10] The rule making requirements with respect to hearings are set forth in §4(b) of the Administrative Procedures Act, 5 U.S.C. §1003(b) (1958), which provides:

> "After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose."

It is apparent that in rule making hearings the purpose is to permit the agency to educate itself and not to allow interested parties to choose the issues or narrow the scope of the proceedings. The purpose of the notice is to allow interested parties to make useful comment and not to allow them to assert their "rights" to insist that the rule take a particular form. The agency,

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[9]Both the Senate and House committee reports on the bill extending the time allowed the Commission (77 Stat. 5 [1963]) treated the action here under review as rule making: "The volume and diversity of comments from carriers and shippers *in the necessary rule making procedures* were enormous * * *." S.Rept. No. 79, 88th Cong., 1st Sess. 2 (1963) (emphasis added); "In view of the necessity of examining these contracts * * * and the *necessity of instituting a rule making procedure* to achieve uniformity in its results * * *." H.R.Rept. 164, 88th Cong., 1st Sess. 2 (1963) (emphasis added).

[10]*Anglo-Canadian Shipping Co. v. FMC*, 310 F.2d 606 (9 Cir. 1962), cited by petitioners is not in point as there all parties agreed that the proceeding was adjudicatory, 310 F.2d 606, 615, n.2.

in rule making, can look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise.

That §7 and §8 of the Administrative Procedures Act are not to apply to the rule making hearings required by §14(b) of the Shipping Act is also clear from §4(b) of the Administrative Procedures Act:

> "Where rules are required by statute *to be made on the record after opportunity for any agency hearing*, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection." [Emphasis supplied.]

While §14(b) does require "notice and hearing," still, it does not require that the rules for which it provides to be made "on the record" after opportunity for agency hearing. The provisions of §7 and §8 of the Administrative Procedures Act, therefore, do not apply to the rule making provisions of §14(b) of the Shipping Act.

Petitioners contend that the Commission, by ordering hearings on the individual contracts proposed by the conferences, abandoned its rule making approach and resorted instead to a series of adjudicatory proceedings upon the individual contracts under consideration; that the requirements of §7 and §8 of the Administrative Procedures Act should apply to those proceedings. They assert that when, on March 27, 1964, *The Dual Rate Cases* was handed down, the Commission thus, without notice, reverted to rule making, disregarding and abandoning in mid-stream their adjudicatory proceedings and the rights of the conferences which were then in issue.

In this we agree in part with petitioners.

As we view the situation, the Commission was faced with the choice of going ahead as originally planned by general rule and uniform contract or of proceeding on a contract-by-contract basis in a series of adjudicatory proceedings to determine the sufficiency of the individual contracts under §14(b), with the Act, unimplemented by rule, forming the applicable standard.

Although the proposed uniform contract, as published in January, 1963, was never formally withdrawn, still, by acceding to

conference demands, and by entering its orders of April 9, 1963, for hearing before an examiner of petitioners proposed contracts, the Commission indicated that it had chosen to proceed not by general rule but by individual adjudicatory proceedings on the individual contracts. Petitioners could reasonably assume from this action that they were engaged in a hearing under §7 and §8 of the Administrative Procedures Act, with the issues limited to such matters as were there presented.

We do not agree with petitioners that the Commission thereafter was without power to revert to general rule and that its only alternative was to proceed under §7 and §8.

In our judgment, however, under the requirements of the Administrative Procedures Act, it could not revert to general rule without first giving a §4(b) notice of its intention and opportunity to petitioners to participate in the making of rules in the manner set forth in §4(b). This it has not done. The remedy, however, is not through judicial action to restore to the conferences their own form of contract, but rather to restore to the conferences their opportunity to participate.

We conclude that the order of the Commission must be set aside and that in any new order opportunity must be afforded petitioners to participate in rule making in such manner as the Commission may direct pursuant to §4(b); such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in the hearings in petitioners' adjudicatory dockets or in Docket 1111.

This is not intended to suggest that notice was deficient only in its scope and that it must have encompassed the whole of the rule which ultimately emerged. We recognized that such is not the law. The deficiency here was in failure to give any notice whatsoever. It is the prejudice resulting from this failure which is limited, and which impels us to limit the scope of the participation to which petitioners are entitled upon remand. Petitioners have already, through the hearings which have been had, enjoyed to the fullest participation in the making of the resulting rule in the areas covered by those hearings.

We gather that this area in which petitioners have already participated covers the greater portion of the contract as ap-

proved by the Commission. As to that portion, the Commission is, of course, free forthwith to promulgate rules and establish the substance of approved contracts as to petitioners.

As to the contract of one of the petitioners, Latin America/ Pacific Coast Steamship Conference (Docket No. 1092), a hearing was ordered by the Commission but the conference was not named as party to Docket 1111. What we have said, however, applies to this petitioner as well as to the rest. Since the Commission was proceeding in the area where rule making was not required to be made "on the record," the notice and hearing requirements of §4(b) of the Administrative Procedures Act were met if the conference had notice, and an opportunity to present its views to the Commission in hearing of Docket 1111. This it clearly had.[11] If it had anything to submit it could have joined in any appropriate proceeding.

Accordingly the orders under review are hereby set aside.

[11]For example, the conference in Docket 1092 was represented by the same counsel who represented the conference in Docket 1057, which was made a party to Docket 1111.

In the United States Court of Appeals
for the Ninth Circuit

Pacific Coast European Conference and Members Thereof, Petitioners, vs. United States of America, and Federal Maritime Commission, Respondents.	No. 19,237

DECREE

On petition to review Orders of the Federal Maritime Commission

This cause came on to be heard on the petition to review Orders of the Federal Maritime Commission, and on the transcript of record, briefs filed and arguments had by counsel for respective parties, and was duly submitted: On consideration whereof, It Is Now Here Ordered and Adjudged by this Court that the orders of said Federal Maritime Commission under review be, and hereby are set aside.

Filed and entered February 3, 1965.

In the United States Court of Appeals
for the Ninth Circuit

Pacific Coast River Plate Brazil Conference and its Member Lines, Petitioners, vs. United States of America and Federal Maritime Commission, Respondents.	No. 19,239

DECREE

On petition to review Orders of the Federal Maritime Commission.

This cause came on to be heard on the petition to review Orders of the Federal Maritime Commission, and on the transcript of record, briefs filed and arguments had by counsel for respective parties, and was duly submitted:

On consideration whereof, It Is Now Here Ordered and Adjudged by this Court that the orders of said Federal Maritime Commission under review be, and hereby are set aside.

Filed and entered February 3, 1965.

Appendix C

Supreme Court of the United States

October Term, 1965

No.

Pacific Coast European Conference, et al.,
Petitioners,

vs.

United States, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 27, 1965.

William O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 17th day of July, 1965.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, and their Respective Member Lines,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

GRAHAM JAMES & ROLPH
LEONARD G. JAMES
ROBERT L. HARMON
F. CONGER FAWCETT
310 Sansome Street,
San Francisco 4, California,
Attorneys for Petitioners.

INDEX

	Page
F.M.C. Docket 1007—*Pacific Coast European Conference—Exclusive Patronage (Dual Rate) Contract*—Initial Decision of Walter F. Southworth, Examiner, served December 5, 1963	1
F.M.C. Docket 1057—*Pacific Coast River Plate Brazil Conference—Exclusive Patronage (Dual Rate) Contract* (consolidated with Dockets 1003, et al.)— Initial Decision of Edward C. Johnson, Examiner, served January 10, 1964	43
"The Dual Rate Cases" (majority opinion), dated March 27, 1964	119
"The Dual Rate Cases" (concurring and dissenting opinion of Commissioner Patterson), dated March 30, 1964	181
F.M.C. Docket 1007—Order of March 27, 1964, plus "Approved Contract Form"	227
F.M.C. Dockets 1057, et al.—Order of March 27, 1964, plus "Approved Contract Form"	240
F.M.C. Docket 1007—Order on Remand, plus "Approved Contract Form", served June 24, 1965	257
F.M.C. Dockets 1057 and 1092—Order on Remand, plus "Approved Contract Form", served June 24, 1965	271
F.M.C. Dockets 1007, 1057, and 1092—Notice of Proposed Rulemaking—*Dual Rate Contract Provisions for Pacific Coast European Conference, Latin America/ Pacific Coast Steamship Conference, and Pacific Coast River Plate Brazil Conference*, served June 24, 1965	288

Served
December 5, 1963
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

No. 1007

PACIFIC COAST EUROPEAN CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

Use of proposed dual rate contract, modified in accordance with this decision, permitted pursuant to section 14(b) of the Shipping Act, 1916, subject to the decision in Docket No. 1111 with respect to issues severed from this proceeding.

Leonard G. James, for respondents.

T. R. Stetson for intervener United States Borax & Chemical Corporation.

Robert J. Blackwell and *Howard A. Levy*, Hearing Counsel.

INITIAL DECISION OF WALTER T. SOUTHWORTH, EXAMINER[1]

This proceeding arose out of the filing by Pacific Coast European Conference (hereinafter called the Conference) of amendments to its exclusive patronage (dual rate) contract pursuant to section 3 of P.L. 87-346. The amendments purported to bring a pre-existing dual rate contract

[1]This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. See Rules 13(d) and 13(h), Rules of Practice and Procedure (46 C.F.R. 201.224 and 201.228).

into compliance with section 14(b) of the Shipping Act, 1916, as amended by P.L. 87-346 (hereinafter, as so amended, called the Act), so as to make the contract lawful for a period not exceeding that within which the Federal Maritime Commission (hereinafter, with its predecessors, referred to as the Commission) was required to approve, disapprove, cancel or modify all such agreements and amendments.

By order of investigation and hearing dated April 9, 1963, naming the Conference and its members as respondents, the Commission instituted this proceeding pursuant to sections 14(b) and 22 of the Act to determine whether the form of the Conference's contract as amended meets the requirements of section 14(b), or will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors; and whether such contract should be permitted to be used or should be ordered modified.

Briefly, section 14(b) directs the Commission to permit the use of an agreement which provides lower rates in return for an exclusive patronage commitment—a so-called dual rate contract—which is available to all shippers and consignees on equal terms and conditions, provided that the agreement (a) expressly contains eight specified provisions (discussed in detail hereinafter) including provision for a spread between ordinary and contract rates which the Commission finds to be reasonable in all the circumstances but in no event exceeding 15% of ordinary rates, and (b) contains such other provisions, not incon-

sistent with the statute, as the Commission shall require or permit; unless the Commission affirmatively finds that the agreement will be detrimental to United States commerce or contrary to the public interest or unjustly discriminatory or unfair as set forth above.

By order dated May 28, 1963, the Commission severed from the issues in this proceeding, and other similar proceedings, five issues said to be common to all of them, and directed that those issues be consolidated for hearing and determination in a proceeding called "Dual Rate Contracts, 1963—Adjudication of Major Issues", Docket No. 1111. The issues specified in the order of severance were as follows:

"(a) Whether the Commission should approve, disapprove or require modification of contract provisions requiring inclusion in the contract of affiliates of the contract shipper or of other connected companies.

(b) To what degree, if any, may or should contracts exclude a portion of shipments, commodities, or shipments on owned or chartered vessels?

(c) Whether the provision required by section 14 (b)(3), in all contracts, to limit the coverage of the contracts to "those goods of the contract shipper as to the shipment of which he had the legal right at the time of shipment to select the carrier" requires special language in the contracts in order to avoid uncertainty and potential disputes as to the obligations of the merchant, or whether the language of section 14(b)(3) should be incorporated, verbatim, in the contracts.

(d) Whether the Commission should approve, disapprove or require modification of contract provisions imposing notice and disclosure requirements upon the

contract shipper in the event of non-conference shipments or of suspected or alleged breach of contract, and provisions relating to the burden of proof as to whether he has violated the contract.

(e) Whether the contracts should permit carriers or conferences to terminate individual contracts for breach or alleged breach of contract by the merchant."

Respondents' motion filed June 24, 1963, to dismiss Docket No. 1111 with respect to them was denied by the Commission by order dated July 11, 1963. Accordingly, the approval, disapproval or modification of the subject contract insofar as the above matters are concerned will be determined in Docket No. 1111; and this decision must therefore be read in conjunction with the decision in that proceeding.

Four shippers and two associates of shippers intervened, but none appeared at the hearing except United States Borax & Chemical Corporation, which also filed proposed findings and conclusions.

Background Findings Concerning the Conference and its Operations

Pacific Coast European Conference, an "outbound" conference, operates under F.M.C. Agreement No. 5200, originally approved May 26, 1937, as amended. The present conference agreement supersedes conference agreements No. 75, approved March 9, 1926, and No. 176, approved May 11, 1932. It has 22 members at present. Its proposed dual rate contract relates to the trade from the Pacific Coast ports of Washington, Oregon and California to ports in the United Kingdom, Ireland, the Scandinavian

Peninsula, Continental Europe, including Baltic and Mediterranean ports, and Morocco. This trade is within the scope of the Conference Agreement.

The Conference had a dual rate contract system in effect when the present conference agreement was approved in 1937. At present it has in force about 5000 dual rate contracts, covering most tariff items other than non-commercial cargo (such as household goods, relief goods and corpses) and a few bulk commodities. Open-rated items (almost all of which, at present, are commodities shipped in bulk) likewise are not covered by dual rate contracts.

The Conference offers its dual rate contract to all bona fide shippers, but not to consignees as such. It has never declined to enter into a dual rate contract with a shipper, at least during the sixteen years' regime of its recently-retired Chairman; on the other hand, it goes "to extreme lengths to get back into the fold shippers who have gone outside."

During the calendar year 1962 there were 371 Conference sailings from United States ports—about one a day on the average throughout the year. However, the frequency of sailings is by no means uniform as to the various countries of destination served by the Conference, and varies widely between such ports as Rotterdam, London and Antwerp, on the one hand, and Mediterranean, particularly Eastern Mediterranean, ports on the other hand.

Non-conference competition has caused acute rate problems in recent years, especially in the important canned

goods traffic. The rate on canned goods to the Continent was $1.40 immediately after the war, and rose to $1.75 in 1955 and $2.05 in 1957; in 1959 the rate went down to $1.25 as a direct result of non-conference competition. The rate is now $1.75 on some items and $1.55 on others.

The spread between contract and non-contract rates has been generally 15 cents per 100 lbs., or $3.00 a ton, for many years. In connection with the recent threatened termination of contracts by several principal shippers of canned goods, arising out of non-conference rate competition, the Conference, in an effort to make its contract more attractive, applied to the Commission for approval to change the spread to 15% of non-contract rates. The application, dated August 1, 1963, has not yet been acted upon by the Commission. The Conference proposes, in the present proceeding, a contract providing for the 15% spread.

The Form of the Contract

At the hearing the Conference submitted for approval, as Exhibit 4, a form of contract substantially the same (except for the deletion of Canada as an area of shipment) as the contract as amended and put into use following the passage of P.L. 87-346. Pursuant to arrangements made at the hearing, the Conference submitted with its proposed findings and conclusions a revised version, which meets some of the suggestions advanced by the Examiner at the hearing. This revision, which became the form proposed for approval in this proceeding, is set forth in Appendix A hereto, together with modifications directed to be made by the Examiner upon consideration of the complete record.

The contract qualifies for approval only if it *expressly* deals with eight subjects in the manner provided by section 14(b), clauses (1) to (8) inclusive. It will first be tested against these requirements (other than clause 14 (b)(3), which is covered by Docket No. 1111).

1. *"Prompt Release"—section 14(b)(1)*:

No contract can be approved unless it expressly "(1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice".

The relevant contract provision is Article 4, the second sentence of which reads as follows:

> "In the event that none of the Carriers is able to furnish reasonably prompt space for specific shipments when requested by the Shipper, the latter will be free to forward such shipments by any vessel other than those of the Carriers without violating this Agreement, provided that the Shipper first notifies the Conference at San Francisco in writing of its inability to obtain space required, and allows the Conference forty-eight hours after receipt of such notice to confirm that the space is not available."

Except that 48 hours is specified as the period of "prompt release", this provision practically paraphrases the statute—although it antedates the statute by at least 13 years, as shown by Exhibit 23. Hearing Counsel, however, describe it is as "unreasonable and arbitrary", and propose a finding that it "does not afford Merchant's prompt release on reasonable notice and is in derogation

of Section 14b(1)." No such finding or conclusion can be made.

It may be noted that Hearing Counsel do not object to the 48-hour period allowed the Conference to confirm that space is not available, except that it does not exclude week-ends and holidays; that, however, is the Conference's problem, not the shipper's, and the Conference is apparently satisfied, the point having been discussed at the hearing. Most of the other objections raised by Hearing Counsel have to do with what might happen under hypothetical situations which they propounded on cross-examination of the Conference witness. No objection was offered by any shipper notwithstanding the many years the clause has been in operation, and intervener United States Borax & Chemical Corporation, the only shipper to offer testimony, endorsed the clause and its operation on the basis of intervener's experience. As intervener states in its brief, "Most of the hypotheses posed during examination of McArt[1a] on this were so farfetched, so far from the way business is done—as testified by the Witness, that they should be completely disregarded."

A clause proposed by Hearing Counsel calls for a request for space by the shipper "as early as practicable" before the sailing date of the vessel described. Just how this is superior to "reasonably prompt space" (except, perhaps, grammatically) is not apparent. Following that, however, Hearing Counsel would give the Conference a specific number of days *after the latest date requested by the shipper* in which to provide space—thus providing a

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[1a]The former Chairman of the Conference, now its Senior Consultant.

built-in frustration for the shipper who, no matter how reasonable, how urgent or how vital his "latest date" might be, would always be required to wait an additional period. As the intervener says in its brief:

> ". . . a clause such as proposed by Hearing Counsel . . . would be detrimental to the shipper; because if he could not be released till within fifteen (15) days *after* the last date he needed his sale would have been lost."

Hearing Counsel's well-intentioned desire to obtain the perfect clause, automatically providing uniform, objective and equitable results in every conceivable situation, is probably impossible of attainment. Certainly in the case of this Conference, with its wide scope of areas of discharge and great variation in the frequency of sailings to different areas, a flexible clause is necessary, as a practical matter, for the protection of shipper as well as Conference. Both the statute and the contract clause necessarily rely on reasonableness in the particular circumstances; the "reasonably prompt space for specific shipments" of the contract is the equivalent of "as much space as the contract shipper shall require on reasonable notice" in the statute. " 'Reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes a reasonable delay can be determined." *In re Nice & Schreiber,* 123 F. 987, 988.

It is concluded that the Conference's clause (Article 4) adequately complies with section 14(b)(1).

2. *Maintenance of rates for at least 90 days—section 14(b)(2)*

Under the statute, the contract must expressly provide that "whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days."

The last sentence of the first paragraph of Article 6 of the contract provides:

> "Whenever a contract rate shown in the applicable Conference tariff becomes effective, insofar as it is under the control of the Carriers, it shall not be increased before a reasonable period, but in no case less than ninety days."

This is substantially the language of the statute, and complies with section 14(b)(2).

3. *Legal right to select carrier—section 14(b)(3)*

This subject is one of the "severed issues" to be determined in Docket No. 1111. It is not expressly covered in the contract.

4. *Natural Routing—section 14(b)(4)*

This is the requirement that the contract "expressly * * * does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available."

The Conference flatly refuses to cover this subject in its contract, because, it says, "the statutory language is

vague and uncertain", and "It is difficult to see how these Respondents could be expected to carry out a contractual commitment which they cannot understand, and the meaning of which is not explained either in the statute or its legislative history."

On September 23, 1961, Senator Engle explained the purpose of the "natural routing" provision very simply (107 Cong. Rec. 19782; p. 456, Index to the Legislative History of the Steamship Conference/Dual Rate Law):

> "First, we have reinserted the provision that dual-rate contracts must 'not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available.' We did this to make it clear in the statute that no dual-rate contract may require contract shippers to divert shipments for (sic) their normal or usual routings not served by the dual-rate carrier or conference but otherwise regularly served directly."

This is not so difficult; and unless the statutory provision, or the substance thereof, is expressly contained in the contract, the contract cannot be approved under section 14(b). Since the Conference professes such difficulty with the statutory language, the following is suggested as an alternative, to be inserted in Article 1 as shown in Appendix A:

> Nothing in this Agreement contained shall require the Shipper to divert any shipment from the normal or usual routing for such a shipment where such routing is not served by the Conference but is otherwise regularly served directly.

If the Conference prefers, it would be acceptable for it to use, in lieu of the foregoing, a provision substantially in the language of the statute, as follows:

> "Nothing in this Agreement contained shall require the Shipper to divert shipment of goods from natural routings not served by the Conference where direct carriage is available."

5. *Damages for Breach—section 14(b)(5)*

Under the statute, the contract must contain a provision which expressly "limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law; *Provided, however,* that the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling".

The relevant contract provision is found in the first two sentences of Article 2, which read:

> If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impractical to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate or rates currently in effect less the cost of handling.

Hearing Counsel suggests, in lieu of "less the cost of handling", the words "less the estimated cost of loading

and discharging which would have been incurred had the shipment been made on a Conference vessel". This would avoid confusion with the "handling charges" customary on the Pacific coast, which are quite a different thing. For the same reason, the intervener United States Borax & Chemical Corporation proposes a definition of "cost of handling" as cost of loading and unloading. The Conference objects to such proposals, claiming that there is no authority for the proposition that Congress meant "cost of handling" to mean cost of loading and discharging; in fact, the Conference says, these are "meaningless words" which it has copied into the contract merely to comply with section 14(b)(5).

There can be no doubt as to Congress' intention. As stated at page 12 of Senate Report 860, 87 Cong. 1st Session (page 212, Index to the Legislative History of the Steamship Conference/Dual Rate Law), the cost of handling "is understood to mean the cost of loading the cargo onto the vessel and discharging the cargo from the vessel."

Under the circumstances, it is necessary either to explain in the contract what is meant by "cost of handling", or substitute "estimated cost of loading and discharging" therefor. Hearing Counsel's suggestion requires fewer words and seems adequate for the purpose.

Both Hearing Counsel and the intervener also call attention to the ambiguous use of "currently" in the second sentence of Article 2; and Hearing Counsel properly except to the failure of the contract to provide expressly, as required by section 14(b)(5), for the limitation of

damages for any other breach to "actual damages to be determined after breach in accordance with the principles of contract law".

The modifications accordingly required to be made in Article 2 are indicated in Appendix A.

6. *Termination—section 14(b)(6)*

The statute requires a provision which expressly "permits the contract shipper to terminate at any time without penalty upon ninety days' notice." Article 10 of the contract provides:

> Unless earlier termination as herein provided, this Agreement shall remain in effect indefinitely, provided, however, it may be terminated by either party giving to the other ninety (90) days written notice of intention to terminate the same.

This complies with the requirement of the statute insofar as the shipper is concerned; it is not necessary to add "without penalty", as Hearing Counsel contend, since an unqualified right to terminate on notice can mean only that. Hearing Counsel also object to the 90-day termination right given to the Conference, because it would permit the Conference to terminate an individual shipper's contract without similarly terminating all contracts.

There is nothing in the statute expressly forbidding the termination of individual contracts. Section 14(b) merely provides, with respect to termination by a conference, that the conference "may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity." To

terminate the contract or the entire system voluntarily, however, the Conference would have to have the contract right to do so, as well as the right given by statute—which latter right is really a qualification, since it is followed by the proviso that in the event of such termination, the system cannot be resumed except with prior approval of the Commission. If the Conference should terminate a single contract, pursuant to the proposed contract provision, it would not run afoul of the system or commodity termination provision of the statute; although it might thereafter be in violation because of its obligation, under the statute, to make the contract available "to all shippers and consignees on equal terms and conditions." Approval by the Commission of the proposed termination clause could not operate to waive this statutory requirement. On the other hand, it is possible for the Conference to terminate some or perhaps all of its contracts without terminating the entire system, without violating the "availability" clause; where, for instance, a contract signatory has ceased to be a bona fide shipper or consignee, or where the Conference wishes to promulgate a new form of contract and has obtained Commission permission to do so. In any event the Conference should be able to clear its mailing lists from time to time by eliminating inactive contracts, as it has done in the past. Probably there are other conditions under which a single contract could legally be terminated, and since the contract has no expiration date, both parties should have the right to terminate upon reasonable notice. It goes without saying, however, that anything a contracting party does under or pursuant to this or any other contract must

be done in accordance with applicable law; and approval of the form of contract by the Commission cannot change that principle. Certainly the Commission should not approve a clause the operation of which would necessarily and under all conditions constitute a violation of law, but that is not the case here.

7. Spread between ordinary and contract rates—section 14(b)(7)

The statute requires an express provision for "a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates."

The contract provides (Article 1) that the "contract rates shown in the applicable tariff shall be less than the non-contract rates by 15% of the non-contract rates." Thus the spread proposed to be used is within the maximum permitted by the statute.

The statute also requires a finding that the proposed spread is "reasonable in all the circumstances", as well as within the permissible maximum.

The present spread of 15¢ per hundred pounds (or $3.00 per ton) has been in effect since prior to World War II, when rates were considerably lower than they are now. Even at present rate levels, it was necessary to reduce the spread on some commodities when the 15% limitation of P.L. 87-346 became effective, although on higher-rated commodities the spread now represents a great deal less than 15% of either the contract or non-contract rate. The contract rates per 100 lbs. on canned

goods, one of the Conference's most important commodities, have ranged since 1946 from $1.25 to $2.40; on those rates the 15¢ spread represents 12% and 6.2%, respectively, of contract rates, or 10.7% and 5.8%, respectively, of non-contract rates. This illustrates the basic weakness of the fixed-dollar spread now employed; while it may represent more than 15% in the case of low-rated cargo, it is such a small percentage of the freight on higher-rated, more attractive cargo as to make the dual-rate system of little value with respect to shippers of such commodities. Such shippers may find it to their advantage to use non-conference vessels when they are available, and to pay non-contract rates when they must use the regularly-scheduled Conference service.

The Conference recently had reason to recognize the effect of present-day rates upon the effectiveness of its fixed-spread dual-rate system, when several of the most important canned goods shippers in the trade served notice of contract cancellation. In the course of negotiations with these shippers, it was found that a spread of 15¢ per 100 lbs. was not enough to keep these shippers in the Conference, at least in the present state of non-conference competition. Accordingly the Conference filed its application of August 7, 1963, for permission to use the 15% spread now proposed.

The Report of the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 87th Congress, 2d Session (House Report No. 1419) found (p. 203) from a study of the frequency distribution of spreads in dual rate agreements of 61 conferences that the most common spreads were 20% (of contract rates, equal to

16⅔% of non-contract rates) when figured on a percentage basis, and $3 or $4 per ton (15¢ or 20¢ per 100 lbs.) when based upon a dollar differential. Since most of these conferences had had their dual rate systems for many years, this tends to indicate that in the past a dollar spread of $3 or $4 was of the order of 20%. Hence the increase to 15% of non-contract rates is not any indication of unreasonableness, but rather represents a return to the range of the historically normal spread.

There was no opposition to the proposed spread. Although comments had been invited on the Conference's earlier proposal of a contract providing for a spread "not more than 15% of the non-contract rates", no shipper or association of shippers appeared at the hearing to object; and, with the exception of United States Borax & Chemical Corporation (which expressly endorsed the spread now proposed), none of those who had intervened showed any interest in the proceeding after the Docket No. 1111 issues had been severed. It must be inferred that any spread up to the permissible maximum would be considered reasonable by them.

It is found that the present spread is too low to be fairly appropriate to its purpose, and that the proposed spread of 15% of non-contract rates is reasonable in all the circumstances.

Hearing Counsel contend that a rounding-off provision, to the nearest 25¢ per ton or 5¢ per 100 lbs., should be required, to avoid rates in odd cents, or fractions thereof. Surely this is something that the Conference may decide for itself. It was made clear at the hearing that the Conference could have a rounding-off provision if it asked

for it, but the Conference's witness, while favoring such a provision, stated that he had no authority to commit the Conference, and the revised contract as finally submitted after the hearing did not provide for rounding off. Of course the Conference can round off to the nearest penny, the national currency system being as it is, without any special provision in the contract; but the Commission cannot arbitrarily require any other rounding-off procedure.

8. *Cargo excluded—section 14(b)(8)*

The statute requires an express provision that "excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots". Such a provision, in the words of the statute, is contained in Article 1 of the contract.

"Permitted or required" provisions—section 14(b)(9)

Section 14(b)(9) requires that a dual rate contract expressly contain "such other provisions not inconsistent herewith as the Commission shall require or permit". This is not taken to mean that the Commission has a free hand to write a contract for the parties; it does, however, permit the Commission to require modifications to eliminate matters which would make the contract detrimental to United States commerce or contrary to the public interest, or unjustly discriminatory or unfair as between the classes designated in the statute. It necessarily gives the Commission the right to insist that contract terms be reasonably clear and free from ambiguity. Also, having in mind that the contract form will necessarily be offered to the

shipper on a take it or leave it basis, it would be contrary to the public interest for the Commission to approve any provision manifestly unfair to shippers.

Omitting any reference to matters clearly and exclusively within the scope of Docket No. 1111, the following are the only remaining provisions of the proposed contract which require discussion:

Option to cancel upon notice of increase in rates

Articles 5 and 6 of the contract provide that notice of rate increases shall be given only to shippers who furnish a list of commodities in which they are interested and request notice of changes in rates applicable to those commodities. In the case of increases, such shippers will be given written notice thereof not less than 60 days before the effective date. The increase shall be deemed "accepted" by the shipper unless he notifies the Conference to the contrary in writing within 30 days, in which event the shipper or the Conference may, not less than 15 days before the effective date of the increase, cancel the contract; but the Conference may rescind the increase not less than 10 days before its effective date and continue the contract in effect.

Hearing Counsel objects that the thus right given the Conference to cancel an individual contract, and on less than 90 days' notice, is unlawful under section 14(b). However, a shipper's contract *must* be terminated, one way or another, if he refused to "accept" a rate increase legally put into effect through the Conference's tariff. This points up the real problem posed by Article 6: what happens if neither the Conference nor the shipper

exercises its right to terminate after the shipper gives notice of non-acceptance of a rate increase, and the Conference does not rescind the increase? The shipper cannot receive any preference by reason of his "non-acceptance", of course. Obviously the shipper's right to refuse to accept a rate increase is illusory, unless it is understood to bring about a termination of the contract upon the effective date of the increase, subject only to a timely rescission of the increase.

The required modification of the first paragraph of Article 6 set forth in Appendix A is intended to eliminate all the objectionable features thereof, without changing the Conference's basic intention. There is no valid reason to change the 60 day notice provision to 90 days, as proposed by Hearing Counsel, particularly since the statute requires no notice at all other than the 30 days' (or less, if approved by the Commission) publication provided by the new section 18(b) of the Act.

Force Majeure

The second paragraph of Article 6 permits the carriers, "or any of them", in case of certain events of force majeure, to cancel the agreement upon 15 days' notice to "the Shippers, or any of them"; or to increase any rate upon such notice, with an option to "the Shipper" to give notice of non-acceptance of the rate within 10 days, and to cancel the agreement prior to expiration of the 15 day period.

Hearing Counsel object to a right to cancel an individual contract, and also to the right to increase rates on 15 days' notice, as "in derogation of section 14(b)(2)."

The first objection will be eliminated by the required modification indicated in Appendix A, to the effec that, in case of force majeure, operation of the contrac may be suspended to the extent required by the condition, and not cancelled outright. This modification, which makes the force majeure provision similar to those proposed by other conferences and approved in initial decisions, gives a flexibility which should benefit the Conference as well as its shippers. The last two sentences, giving the Shipper the right to refuse a rate increase and thereafter the option to cancel the agreement, are modified in manner similar to the corresponding provisions of the first paragraph of Article 6, and for similar reasons.

As to the second objection, the provision for 15 days' notice does not supersede the statutory requirement of 30 days' publication following filing with the Commission, subject to reduction of such period in the Commission's discretion. The Conference must still comply with section 18(b). If it wants to bind itself by contract to give 15 days' written notice to contract shippers who request notice, in addition to the statutory publication, there is no reason why it should not be permitted to do so. Conceivably this could result in the Conference's not being able to effectuate an increase as quickly as the Commission in its discretion would permit, but this must be apparent to the Conference. The provision cannot, on the other hand, shorten the 30 day publication and filing requirement in the absence of Commission permission, in any particular case, pursuant to section 18(b).

Article 6 of the contract is approved subject to the modifications indicated in Appendix A.

Changes in commodities subject to contract

Article 7 provides that commodities may be placed on or withdrawn from dual rate status from time to time, with notice to the "interested" shipper and such shipper's option to terminate his agreement as in the case of rate increases. It should be noted that this paragraph cannot eliminate or shorten the 90 day notice required by section 14(b) to be given *all* signatories when the dual rate system is terminated with respect to any commodity; also that this Article may be affected by the decision in Docket 1111.

The last sentence of Article 7 has been modified slightly to conform with the modifications of Article 6, and also to avoid confusion with the force majeure procedure of Article 6. Force majeure could hardly compel a change in the dual rate status of a commodity, beyond the suspension provided for in Article 6.

The notice and cancellation provisions of Article 7 do not seem to have much practical value, particularly in view of the 90-day statutory notice requirement. It is suggested that the Conference consider, in lieu of Article 7, the one-sentence provision used in another Pacific Coast conference contract:

> "Additional commodities may be placed on a contract rate basis and contract rate commodities may be withdrawn by Carriers in the time and manner provided by law or regulation."

The foregoing is approved as an alternate Article 7, subject to the decision in Docket No. 1111.

Arbitration

The Examiner's only objection to Article 9, the arbitration clause, is its provision that arbitration shall be pursuant to the Act of February 12, 1925. The latter act was repealed by the Act of July 30, 1947. The 1947 act is largely derived from the repealed act. The present act, like the earlier act, is known as the United States Arbitration Act (see *Wilko v. Swan* 346 U.S. 427), and that designation, followed by "9 U.S.C. 1 et seq.", should be adequate.

Hearing Counsel take the position that the Commission should not permit an arbitration clause which "precludes a party from seeking relief before the Commission in lieu of arbitrating." The sole purpose of any arbitration clause is to require the parties to resort to arbitration to determine with speed and finality any private dispute between themselves arising out of the contract; it is not an alternative or appellate procedure. It is true that here the parties would be precluded from seeking reparations in complaint proceedings under section 22 of the Act. However, a complaint proceeding under section 22 could be brought only against the Conference members, and could not in any event be brought by the Conference or its members in the usual case of an alleged breach by a shipper, since a shipper is neither a carrier nor "other person subject to this Act." As for the shipper, he could bring a complaint proceeding for reparation (i.e., an action for damages for breach of contract) under section 22 only on the dubious theory that the breach was also a violation of the Act. A waiver of such theoretical right should be permitted in the interests of prompt, economical

settlement of private disputes under the contract. No other type of section 22 proceeding could be affected by the arbitration clause or by the decision of an arbitrator. Specifically, it does not prevent the Commission, on its own motion, from investigating any violation of the Act and making such order as it deems proper, other than for the payment of reparation for breach of contract.

So far as the present contract relates to relations between the contracting parties it is no different from any other commercial contract. The fact that the Commission has approved it, and required or permitted it to include certain provisions to meet statutory requirements, does not change its character. There cannot be any question as to whether the contract complies with the Act; that is being determined in this proceeding. Any controverted question between the parties can involve simply the application of an ordinary contract to a particular set of facts. Cf. *Anglo Canadian Shipping Co., Ltd., et al. v. U.S.A. & F.M.B.*, 264 F. 2d 405, 414, note 15.

The advantages that prior agreements for arbitration provide for the solution of commercial controversies are generally recognized, and in affording the parties an opportunity to secure prompt, economical and adequate solution of controversies arising thereunder the Conference's arbitration clause is in accordance with Congressional policy (*Wilko v. Swan*, 346 U.S. 427, 438).

Hearing Counsel's proposal would effectively do away with the inherent advantages of arbitration in disputes such as might arise under the contract, and is rejected without the slightest fear that the Commission is thereby "abdicating its responsibility."

Hearing Counsel's proposed "construction" and "amendment" clauses

The contention that the contract must contain "a provision to the effect that (it) is to be interpreted and construed in the light of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission" is rejected. Such a provision is vague, unnecessary and inaccurate. The contract must, of course, be construed and interpreted, like any other contract, subject to and in accordance with all applicable law.

Hearing Counsel also contend that the Commission should not permit a dual rate contract without a provision that "amendments may be made from time to time subject always to the permission of the Federal Maritime Commission." At first glance this provision looks like a harmless statement of the obvious; however, it is quite misleading. For the contract cannot be amended by the parties, in any material way, unless 5000 other Conference contracts are similarly amended, since "equal terms and conditions" must be available to all contract shippers. And if the provision is intended to mean that all the Conference's contracts may be amended unilaterally by the Conference with Commission approval, it is contrary to all previous notions of what contracts are for. The provision will not be required.

Hearing Counsel's Contention that the Contract Must be available to Consignees

At the hearing, it was brought out that the Conference has not, in the many years of its existence, made its dual rate contract available to consignees as such, and that

it does not presently intend to do so. Since section 14(b) provides for Commission approval only of a contract "which is available to all shippers and consignees on equal terms and conditions", the Examiner asked the Conference and Hearing Counsel to brief the question thus presented.

Hearing Counsel assembled a number of references to the legislative history of P.L. 87-346, from which they conclude that the words require that the contract be made available to all consignees as well as shippers. Upon substantially the same material, the Examiner reaches the opposite conclusion.

Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute." *U.S. v. Public Utilities Comm'n*, 345 U.S. 295, 315.

The purpose of H.R. 6775, which became P.L. 87-346, is stated in a single sentence in Senate Report No. 860, 87th Congress 1st Session (August 31, 1961), under the heading "Purpose of the Bill"[2]:

> "The primary purpose of this amended bill is to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers."

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[2]Index to the Legislative History of the Steamship Conference/Dual Rate Law, 87th Congress 2d Session, Document No. 100 (hereinafter the "Index")—p. 200.

This was months after the "shippers and consignees" phrase had got into the bill, under the following circumstances:

H.R. 4299, the predecessor of H.R. 6775, originally (February 15, 1961) referred only to shippers, and covered contracts "available to all shippers in the trade on equal terms . . ."[3] Thereafter, under date of March 20, 1961, the Department of Commerce, in a letter to Chairman Bonner of the House Committee on Merchant Marine and Fisheries, stated in reply to a request for comments:

> "We recommend that the following words be added at the end of this section: "For the purposes of this section, the word 'shipper' shall *include* consignors and consignees". Many of the exclusive patronage contracts currently in effect are between consignors, as well as consignees, and carriers. The recommended language would make it clear that such arrangements *may be continued,* and shall be governed by the safeguards erected in the proposed section." (emphasis supplied)

A similar suggestion was made by Mr. Edward Bransten of the Pacific Coast Coffee Association, in a statement presented to Chairman Bonner's Special Subcommittee on Steamship Conferences, on April 10, 1961[4]:

> "Various steamship conferences also presently apply dual-rate agreements to consignees or receivers of cargo, as distinguished from shippers. This is true in our coffee trades in which the dual-rate system applies. We as receivers of coffee are the signers of

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[3]Index, p. 58.

[4]Hearings Before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, H. Rep., 87th Cong. 1st Sess. p. 389.

> the dual-rate agreements, whereas the shippers in the Latin American Countries are not signers of dual rate agreements. Our present dual-rate agreements are entitled 'Receivers' Freighting Agreement.' In order to make certain that the safeguards contained in Section 14(b) are equally applicable to consignees or receivers of cargo, we believe that it should be made clear that the term 'shipper' includes a consignee or receiver of cargo. Perhaps this could be accomplished by so stating in the committee's report on the bill, but we believe that, in order to avoid all controversy, it would be preferable to clarify this in the statute itself by adding the following new sentence on page 3 at line 11:
>
> The term 'shipper' as used in this subsection includes also a consignee or receiver of cargo."

The change was not made exactly as suggested in the Department of Commerce letter or by Mr. Bransten; instead, in Draft Revision No. 2 of H.R. 4299[5], dated April 13, 1961, the Words "and consignees" were added after "shippers" in the "available to all shippers on equal terms" phrase, and thereafter the expression "contract shipper" was used in place of "shipper", followed by the definition thereof as "a person other than a carrier or conference of carriers who is a party to a contract..." The same scheme was carried over into the successor bill, H.R. 6775. House of Representatives Report No. 498, dated June 8, 1961, which accompanied H.R. 6775 containing the same pertinent language as the statute, said near the end of a long statement headed "Purpose of Bill"[6]:

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[5]Index, p. 70-72.

[6]Index, p. 113.

"In an effort to preserve ocean commerce while doing a minimum of violence to the well-established American Antitrust concept, this bill would authorize carriers and conferences of carriers to enter into exclusive patronage contracts with shippers *or* consignees under certain conditions . . ." (emphasis added).

Hearing Counsel makes much of the fact that Mr. James, counsel for the Conference, in a statement submitted to the Senate subcommittee at the hearing on July 20, 1961[7], objected to the words "available to all shippers and consignees on equal terms", on the ground that they would require the Conference to enter into "many millions" of contracts with "all potential consignees in every country in Europe", in addition to 4,500 shippers on the Pacific coast. Of course the words are susceptible, on their face, of the meaning then assumed by Mr. James; if they were not, this discussion would be quite unnecessary. "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination" ' ". *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479, citing *U.S. v. American Trucking Ass'ns*, 310 U.S. 534, 543-544.

Senate Report No. 860, 87th Congress, 1st Session, was issued August 31, 1961, following Mr. James's testimony. In a section-by-section explanation of the bill, the report seems to go out of the way to indicate that it is not intended to have the effect feared by Mr. James, stating of the pertinent section[8]:

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[7]Hearings Before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, U. S. Senate, 87th Cong. 1st Sess., on H.R. 6775, Part 2, p. 238.

[8]Index, p. 211.

"This section would amend the Shipping Act, 1916, by adding a new section that would require the Federal Maritime Commission, notwithstanding any other provision of the Shipping Act, on application and after notice, to permit any common carrier by water in foreign commerce, or conference of such carriers, to enter into certain types of dual rate contracts with shippers *or* consignees.

First, this section would require that such contracts, if offered to any shippers *and* any consignees, must be available to all shippers and all consignees on equal terms and conditions." (emphasis added.)

If the meaning for which Hearing Counsel contends were intended, one would expect the underlined "or" and "and" to be transposed; and the phrase "if offered to any shippers and any consignees" very clearly spells out the conditions under which the contract must be available "to all shippers and all consignees" on equal terms. This explanation, and the events leading up to the inclusion of the language in the statute, satisfy the Examiner that the reference to consignees in the Act is for no other purpose than to permit dual rate contracts with consignees to the same extent, and upon the same conditions, as with respect to shippers; that the peculiar practice in the coffee trade, and possibly other trades, of using consignee contracts instead of, or in addition to, shipper contracts gave rise to the inclusion of consignees in a statute primarily directed to the authorization of dual rate contracts with shippers; and that there was no congressional intent to require such a radical change in the operation of any conference as would result if the Conference were required

to offer its dual rate contract to consignees throughout the European continent.

It is concluded that the Conference need not offer its contract to consignees. However, if it does offer the contract to any consignee as such (i.e., a consignee who is not also a shipper) it must offer it to all consignees on equal terms and conditions.

Conclusions

Except as may possibly be inferred from the proposed findings and conclusions of Hearing Counsel and the intervener, which so far as material have been discussed above, no one has contended in this proceeding that the contract is or will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; and it is concluded that, upon a record adequate to make the necessary determination, there is no basis for such a finding, provided the modifications directed by this decision are made.

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record in this proceeding it is concluded and found that the contract proposed to be used by the respondents, in the form set forth in Appendix A, if modified in accordance with this decision, and insofar as it

relates to issues not severed from this proceeding by the order of the Commission in the proceeding entitled *Dual Rate Contracts, 1963—Adjudication of Major Issues,* Docket No. 1111:

(a) Provides equal terms and conditions to all shippers (and consignees, if any) who are parties thereto.

(b) Provides lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage to the Conference.

(c) Expressly complies with the provisions of clauses (1), (2) and (4) through (8), inclusive, of section 14(b) of the Shipping Act, 1916; including provision, pursuant to clause (7), for a spread between ordinary rates and rates charged contract shippers which is reasonable in all the circumstances.

(d) Contains, subject to the decision of the Commission in the said Docket No. 1111, such other provisions not inconsistent with section 14(b) of the Shipping Act, 1916, as the Commission requires or permits.

(e) Is not subject to a finding that it will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; and no such finding is made.

Accordingly, pursuant to section 14(b) of the Shipping Act, 1916, an order will be entered permitting the use in foreign commerce by the Conference of a contract which

is available to all shippers and, if it is offered to any consignees as such, to all consignees, on equal terms and conditions, in the form set forth in Appendix A, modified in accordance with this decision, subject to the decision of the Commission in Docket 1111 with respect thereto.

/s/ Walter T. Southworth
Walter T. Southworth
Presiding Examiner

December 3, 1963
Washington, D. C.

APPENDIX A

(Words required by the initial decision to be deleted are marked through with dashes; words required to be substituted or added are underlined. Matter designated as within the scope of Docket No. 1111, and therefore relating to issues severed from this proceeding, is boxed off within ruled lines.)

PACIFIC COAST EUROPEAN CONFERENCE

417 Montgomery Street—San Francisco 4—California.

SHIPPERS RATE AGREEMENT.

THIS AGREEMENT, made as of the day and date set forth below, by and between the SHIPPER named below and the several steamship lines named on the reverse side hereof, herinafter called the CARRIERS,

WITNESSETH:

1. In consideration of the mutual covenants herein contained and the contract rates as shown in the applicable tariff of the Pacific Coast European Conference, hereinafter called the CONFERENCE, the Shipper agrees to offer or cause to be offered for transportation on vessels of the Carriers from Pacific Coast ports of the States of Washington, Oregon and California, to ports of call in the United Kingdom of Great Britain and Northern Ireland, Ireland, the Scandinavian Peninsula, Continental Europe, including ports on and in the Baltic and the Mediterranean Seas, as well as the seas bordering thereon (except the Black Sea), and Morocco all of its shipments by water on which said contract rates are applicable. The contract rates, and the rules, regulations and conditions

applicable thereto, as shown in the applicable Conference tariff, shall govern to the ports of destination as set forth in said tariff. The contract rates shown in the applicable tariff shall be less than the non-contract rates by 15% of the non-contract rates.

This Agreement covers all export shipments of the Shipper to aforesaid countries moving via any Pacific Coast port of the States of Washington, Oregon and California. All such shipments shall be tendered to the Carriers for their vessels which may load at any Pacific Coast port of the States of Washington, Oregon and California, and are scheduled to sail to any ports of call in the aforesaid countries. Failure to so tender any such shipment to the Carriers or shipment by vessels other than those of the Carrier shall constitute a violation of this Agreement. In agreeing to so confine the carriage of its ~~(their)~~ shipments to the vessels of the Carriers, the Shipper hereby promises and declares it is the intent and purpose to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries. This Agreement excludes cargo of the Shipper which is loaded and carried in bulk without mark or count, except liquid bulk cargoes, other than chemicals, in less than full shipload lots.

Nothing in this Agreement contained shall require the Shipper to divert any shipment from the normal or usual routing for such a shipment where such routing is not served by the Conference but is otherwise regularly served directly.*

*Note optional clause, p. 8 of Initial Decision.

2. If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impractical to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate ~~currently~~ in effect at the time of the shipment less the ~~cost of handling~~. estimated cost of loading and discharging which would have been incurred had the shipment been made on a Conference vessel.

Failure of the Shipper to pay liquidated damages within thirty (30) days after the receipt of notice from the Conference that such liquidated damages are due and payable shall be cause for the Conference to terminate the Shipper's right to the contract rates until the Shipper pays to the Conference the amount due. In the event the Shipper violates this contract more than once in any period of twelve (12) months, the Conference may cancel this contract by serving written notice of such cancellation upon the Shipper and notifying the Federal Maritime Commission of such action. If the contract is cancelled for violation thereof as provided herein, the Conference may refuse to enter into a new contract with the Shipper until any unpaid liquidated damages due to the Conference have been paid in full.

Except as hereinabove provided, damages for breach of this Agreement shall be actual damages to be determined after breach in accordance with the principles of contract law.

In order that the Conference may determine the existence or non-existence of a violation hereof, the Shipper shall, upon request, furnish to the Conference full and complete information with respect to any shipment or shipments made by such Shipper in the trade covered by this Agreement.

3. This is a rate agreement and is not and shall not be construed to be a space agreement. Arrangements for the actual carriage of the shipments covered by this Agreement are to be made individually with the Carrier specially agreeing to transport the same and not with the Carriers generally. The Shipper shall have the option of selecting any of the vessels operated by the several Carriers. The Carriers, parties hereto, shall not be jointly and/or severally or at all liable for the defaults or actions of one another.

4. The Carriers severally agree to furnish from time to time, when requested, at the applicable contract rates and subject to the conditions hereafter stated, space for the aforesaid shipments of the Shipper to the discharging ports of the Carrier(s), provided that such space is available when the Shipper makes application therefor. In the event that none of the Carriers is able to furnish reasonably prompt space for specific shipments when requested by the Shipper, the latter will be free to forward such shipments by any vessel other than those of the Carriers without violating this Agreement, provided that the Shipper first notifies the Conference at San Francisco in writing of its ~~(their)~~ inability to obtain space required, and

allows the Conference forty-eight hours after receipt of such notice to confirm that the space is not available.

5. For the purpose of giving Shipper notices of changes in rates, the Shipper may furnish the Conference a list of commodities in which the Shipper is interested. If requested by the Shipper (but not otherwise) the Shipper shall thereafter receive written notice of changes of rates applicable to said commodities.

6. The contract rates of freight named in the applicable Conference tariff are subject to being increased from time to time by the Carriers giving to the interested Shipper (as provided herein) written notice thereof not less than sixty days in advance of the effective date of the proposed increase. ~~The increase shall be conclusively deemed accepted by the Shipper unless it notifies the Carriers in writing to the contrary within thirty (30) days after the mailing of said notice. In the event of non-acceptance of the proposed increase by the Shipper within said thirty (30) days, the Shipper or Carrier, not less than fifteen (15) days prior to the effective date of the increase, may cancel this Agreement by giving written notice to the other, such cancellation to be effective as of the effective date of the proposed increase subject, nevertheless, to Carrier's option to continue this Agreement in effect as to all Shippers of the particular commodity or commodities affected by the proposed increase under the rates in effect when notice of increase was given, provided notice of exercise of such option is given not less than ten (10) days prior to the effective date of the increase.~~ Within 30 days after the mailing of said notice, the Shipper may notify the Conference in writing of its

intention to cancel this Agreement because of the proposed increase, and in such event this Agreement shall be cancelled as of the effective date of such increase unless the Conference shall give notice, not less than 10 days prior to such effective date, that it has rescinded and cancelled such increase. Whenever a contract rate shown in the applicable Conference tariff becomes effective, insofar as it is under the control of the Carriers, it shall not be increased before a reasonable period, but in no case less than ninety days.

In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any government authority, or any official interferences with commercial intercourse arising from war, hostilities or warlike operations, or other major contingencies beyond the Carriers' control, affecting the operations of any of the Carriers in the trade covered by this Agreement, the Carriers, ~~parties hereto, or any of them, at their option,~~ may ~~cancel~~ suspend the effectiveness of this agreement with respect to all operations affected, and shall notify Shipper of such suspension; or may, upon not less than fifteen (15) days written notice given by them to the Shippers~~, or any of them, or may~~ increase any rate or rates applicable hereunder ~~upon similar notice~~ in order to meet abnormal and extraordinary increases in operating costs due to such conditions. ~~Unless the Shipper~~ Within ten (10) days of receipt of such notice of ~~the rate~~ increase ~~pursuant to this paragraph~~ the Shipper may notify the Conference in writing of its intention to cancel this Agreement because of such increase, and in such event this Agreement shall be cancelled as of the effective date of such increase

unless the Conference shall give notice, prior to such effective date, that it has rescinded and cancelled such increase. ~~notifies the Conference in writing that it refuses to be bound by such action, then such action shall be deemed accepted. Otherwise the Shipper shall be entitled to cancellation of this Agreement by notice to the Conference at any time prior to the expiration of the fifteen (15) day period referred to in this paragraph.~~

7.* Additional commodities may be placed on a contract rate basis from time to time. The contract rate on any commodities may be withdrawn by the Carriers from time to time to meet non-conference competition or other conditions which make it expedient. In either case, the time and manner of giving notice of such addition or withdrawal, ~~and of acceptance or non-acceptance~~ and the respective options of the Shipper and Carriers, shall govern as in the case of a rate increase in accordance with the provisions of the first paragraph of Article 6.

8. Should the Carriers during the period of this Agreement reduce rates on any commodity on which contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates during the period same remains in effect.

9. In case of dispute, the Shipper and the Carrier (s) each agree to submit the matter under dispute to arbitration, each appointing an arbitrator and the two so chosen shall select an umpire to which Arbitration Committee all data requested in connection with the matter in dispute shall be made available. Decision of two or more mem-

*Note optional Article 7, page 17 of Initial Decision.

bers of the said Committee shall be binding on the parties and the arbitration shall be made under and pursuant to the terms and conditions of the United States Arbitration Act, 9 U.S.C. 1 et seq., ~~being the Act of February 12, 1925,~~ all of which terms and conditions shall be binding upon the parties hereto.

10. Unless earlier terminated as herein provided, this Agreement shall remain in effect indefinitely, provided, however, it may be terminated by either party giving to the other ninety (90) days written notice of intention to terminate the same.

*_____ *_____

Shipper (Show full Corporate, Company or Individual Name) (Street Address)

*By_____ *_____

(Signature of Company Official and Title) (City, Postal Zone and State)

*_____

(Typed Name of Official and Title)

Dated as of For and on behalf of the Carriers shown on the reverse hereof:

*_____ By_____

Shipper is requested to fill in the required data in spaces indicated by stars (*)

Carriers
Referred to on face hereof
(List of Conference Members)

Served
January 10, 1964
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

No. 1003

CAPCA FREIGHT CONFERENCE

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1009

COLPAC FREIGHT CONFERENCE

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1010

CANAL, CENTRAL AMERICA NORTHBOUND CONFERENCE

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1011

CAMEXCO FREIGHT CONFERENCE

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1018

ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1035

PACIFIC COAST/CARIBBEAN SEA PORTS CONFERENCE

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1040

PACIFIC COAST/MEXICO FREIGHT CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1041

PACIFIC COAST/PANAMA CANAL FREIGHT CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1044

PACIFIC/WEST COAST OF SOUTH AMERICA CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1057

PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1092

IN THE MATTER OF AGREEMENT NO. 8660—LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND PROPOSED CONTRACT RATE SYSTEM

Permission granted pursuant to Section 15 of the Shipping Act of 1916, as amended, to merge and to use Agreement No. 8660 consolidating certain existing ocean freight conferences.

Under Section 14b of the Shipping Act of 1916, as amended, the proposed shippers and receivers rate agreements, as modified, approved.

Leonard G. James, Esq., Robert L. Harmon, Esq. and *F. Conger Fawcett, Esq.* for Latin America/Pacific Coast Steamship Conference, respondent.

J. Richard Townsend, Esq. for intervener Pacific Coast Coffee Association and Pacific Coast Customs and Freight Brokers Association.

T. R. Stetson, Esq. for United States Borax & Chemical Corporation, intervener.

H. B. Mutter, Esq. and *Howard A. Levy, Esq.*, Hearing Counsel.

INITIAL DECISION OF EDWARD C. JOHNSON, PRESIDING EXAMINER[1]

Ten ocean freight conferences[2] filed pursuant to Section 15 of the Shipping Act of 1916 (the Act) Agreement No. 8660 with the Federal Maritime Commission asking approval of a merger or consolidation of these conferences, operating between the West Coast of the United States and Canada and certain ports in Mexico, Central America, the Caribbean and the West Coast of South

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[1]This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 28 C.F.R. 502.224 and 502.228.

[2]Camexco Freight Conference, No. 6670; Canal, Central America Northbound Conference, No. 6070; Capca Freight Conference, No. 6170; Caribbean/Pacific Northbound Freight Conference, No. 8390; Colpac Freight Conference, No. 7270; Pacific Coast/Caribbean Sea Ports Conference, No. 4294; Pacific Coast/Mexico Freight Conference, No. 7570; Pacific Coast/Panama Canal Freight Conference, No. 7170; Pacific/West Coast of South America Conference, No. 4630; and West Coast South America/North Pacific Conference, No. 6270.

Appendix A shows the trades covered by the respective conferences.

America in order to form the Latin America/Pacific Coast Steamship Conference, which will serve the combined trade areas now covered by the ten existing conferences and the East Coast of Mexico and Central America.

Under Section 14b of the Act a proposed "Shippers" and "Receivers" rate agreement (exclusive patronage contract) was filed for approval for use by the merged group. These filings were Docketed as No. 1092 and the Commission ordered an investigation and hearing to determine whether the establishment of a single conference under the circumstances should be approved, disapproved or modified, and further whether the rate agreements filed thereunder meet the statutory requirements of Section 14b of the Act and may be permitted for use in connection with Agreement No. 8660, if approved. Involved also in this consolidated proceeding is the question of approval of eight existing dual rate agreements if Agreement No. 8660 is disapproved.[3]

Respondents were also granted permission in limited fashion to consolidate Dockets 1018 and 1057 with these proceedings, to the exten that those matters are not sub-

[3]Docket No. 1003—Capca Freight Conference; Docket No. 1009—Colpac Freight Conference; Docket No. 1010—Canal, Central America Northbound Freight Conference; Docket No. 1011—Camexco Freight Conference; Docket No. 1035—Pacific Coast/Caribbean Sea Ports Conference; Docket No. 1040—Pacific Coast/Mexico Freight Conference; Docket No. 1041—Pacific Coast/Panama Canal Freight Conference; Docket No. 1044—Pacific Coast/West Coast of South America Conference.

The two additional conferences applying for merger with the others, Caribbean/Pacific Northbound Freight Conference and the West Coast of South America/North Pacific Coast Conference, do not have dual rate agreements and seek none in the event Agreement No. 8660 is disapproved.

ject to Docket No. 1111.[4] In other words Docket Nos. 1003, 1009, 1010, 1011, 1035, 1040, 1041 and 1044 involve the approval, disapproval or modification of the dual rate agreement (exclusive patronage) under Section 14b of the Act, including Dockets 1018 and 1057, the latter two dockets, however, are limited by Docket No. 1111. Docket No. 1092 involves approval or disapproval of Agreement No. 8660 under section 15 of the Act which proposes, as aforesaid, the consolidation of the ten existing conferences.[5]

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[4]Docket No. 1018—Association of West Coast Steamship Companies, Exclusive Patronage (Dual Rate) Contract covers a shipment of coffee from Buenaventura and Tumaco, Colombia to ports in the Pacific Coast of the United States and Canada.

Docket No. 1057—Pacific Coast River Plate Conference, Exclusive Patronage (Dual Rate) Contract covers shipments from Pacific Coast Ports of the United States to all ports of call in Brazil, Uruguay and Argentina.

Docket No. 1111 removes the following issues from Dockets 1018 and 1057: (1) Definition of Contract Shipper, (2) Contract Shipper Commitment, (3) Legal Right to Select Carrier, (4) Notice, Disclosure and Burden of Proof, and (5) Termination for Breach.

Dockets 1003, 1009, 1010, 1011, 1035, 1040, 1041, 1044, and 1092 are exempt from Docket No. 1111.

In letters dated respectively September 25, 1963 and October 1, 1963 from the Chairman's Office, Latin American Freight Conferences, addressed to the Regulations Office, Federal Maritime Commission, Washington 25, D. C., copies of which were sent to the Presiding Examiner and Hearing Counsel, it was stated that Anglo Canadian Shipping Co., Ltd. and Lineas Maritimas de Centro America, Ltd. were no longer signatories to Agreement No. 8660.

[5]One Dual Rate Agreement is applicable to all Dockets.

Active appearances were made by T. R. Stetson, Director of Exports, United States Borax & Chemical Corporation, who generally supported the proposed consolidation and by Robert C. Powell, Chairman of the Steamship Committee of the Pacific Coast Coffee Association, who opposed the proposed consolidation. Hearing Counsel actively participated in the proceeding throughout and presented witnesses both for and against the proposed consolidation.

PRELIMINARY

Under a dual rate system, shippers who agree to ship their cargoes exclusively on vessels of the steamship lines who are members of a conference are given freight rates that are ten to fifteen percent lower than the ordinary conference rates charged to shippers who do not so agree. The conference is a group of ocean carriers engaged in particular trades or associated together under a written agreement whose purpose generally is to establish uniform freight rates and observe practices among the members which are not only to their mutual benefit but benefits the public as well. These conference agreements are lawful when approved by the Commission under section 15 of the Shipping Act of 1916 for that statute exempts these agreements and activities thereunder from the antitrust laws. Section 14b provides that the Commission shall permit the use by a conference of a dual rate contract which is available to all shippers or consignees on equal terms and conditions unless the Commission finds after hearing that the contract "will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors * * * ". The foregoing standards are described as general standards applicable to a dual rate system,

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American Cotton Shippers Association, Dow Chemical Company, Dow Chemical International S.A., National Industrial Traffic League, E. I. du Pont de Nemours and Co., Pacific Coast Customs and Freight Brokers Association and Anderson, Clayton and Company intervened in one or more of the dockets, but did not participate in the hearing.

and there follows in the statute a list of some eight or nine specific or contract requirements as follows:

(1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice;

(2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days;

(3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: Provided, however, That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract;

(4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available;

(5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: Provided, however, That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling;

(6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice;

(7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates;

(8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: Provided, however, That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; - - - .

BACKGROUND AND CONTENTIONS

The trade area involved in this proceeding is between the Pacific Coast of Canada and the United States and Latin America. The East Coast of South America is not involved. The principal commodities shipped in the trades *Southbound* are flour, canned goods, lumber, woodpulp, some petroleum products and fresh fruits. *Northbound* the commodities are coffee, ores and fish. The trades have loading and unloading problems since there is a noticeable lack of shoreside facilities, and also involved in this area are currency requirements and complicated documentation problems. From time to time in the past there has been a limited amount of non-conference competition. The present proposal to consolidate states that economy in conference operations will take place and other benefits will flow to the members of the conference as well as the public. Shipper witnesses testified both for and against the proposal and on the whole it can be said that the opposition stemmed primarily from a fear of what might result from what they term a lack of "flexibility" which to them apparently means that the proposed consolidation would weaken the influence of the shipper in the rate making process while further strengthening the conference's allegedly superior position.

Hearing Counsel, while supporting the adoption of the dual rate system in these trades, objects to the proposed consolidation and takes issue with specific provisions of the proposed contracts thereunder filed by the respondent, on the grounds that the contracts do not conform to the specific substantive provisions and requirements of section 14b of the Act; that Agreement No. 8660 is detrimental to

the commerce of the United States, contrary to the public interest, fails to provide equal terms and conditions for conference membership, and also fails to provide for the maintenance of reasonable procedures for promptly and fairly hearing shippers' requests and complaints; that the ten conferences already have a common Chairman and a central administrative office which provides an administrative unit; that any further consolidation would "form an even stronger monopolistic union;" that the intended purpose of Agreement No. 8660 is to eliminate competition and to control rates in the trades between the Pacific Coast of the United States and Canada and Latin America; that the "ostensible purposes of the proposed amalgamation" to provide more frequent service, reduction of conference expense, and diminution of complicated tariff problems is "merely illusory"; that the United States shipper and receiver on the West Coast at the present time suffers from "rigidity" in the rate making process, which would be further aggravated as a result of the operation of Agreement No. 8660 because that agreement would further eliminate the shipper's flexibility and bargaining position—(Just what these terms mean is hard to determine as they are sweeping in nature, general in meaning, and all inclusive. In any event, no persuasive testimony has been cited to justify this overall conclusion); that this Agrement would be detrimental to shippers or receivers of commodities exempted from the dual rate system inasmuch as they would have difficulty in obtaining non-conference service; that Agreement No. 8660 would remove non-conference carriers from the trade; that Article 4 of the Agreement which prohibits conference

agents from representing non-conference carriers is contrary to the public interest and detrimental to the commerce of the United States; that any provision which prohibited member lines from paying brokerage to freight forwarders who dispatched shipments via non-conference lines was prima facie discriminatory, hostile to the policy of the antitrust laws, unfair as between carriers and shippers; that Agreement No. 8660 fails to provide equal terms and conditions for conference membership in that the terms of admission to membership are uncertain and indefinite; that the Commission is committed to a policy of assuring relatively easy access to conference membership and that in order to assure easy access to conference membership the terms or conditions of membership should be fully understood and susceptible to definite standards; that the terms "substantial" and the terms "reliable" and "just" and "reasonable" and "prompt" as used in the agreements herein are susceptible to too many different standards and interpretations, and could be the source of discrimination against applications for membership; that a better practice would be for the Commission to establish definite standards for membership; that Agreement No. 8660 fails to provide for the maintenance of reasonable procedures for promptly and fairly hearing shippers' requests and complaints; that the record shows instances in which summary procedures are used to act upon requests for rate reduction and that such practices are contrary to the standards enumerated in the Act and that shippers are not allowed to hear the discussions inside the conference on rate matters; that there should be a guarantee to the shipper that the conference would

be made more responsive to the shipper's needs or at least mechanism should be set up to provide the shipper a better "entree" into the discussion of the conference meetings (Mr. Ramond F. Burley, the Conference Chairman, set forth in considerable record detail the care which is taken to give fair consideration to requests for decreases in freight rates from time to time. This evidence will be discussed in greater detail later on in this decision.) Hearing Counsel likewise objects to the respondents' argument that in Agreement No. 8660 only carriers serving a particular trading area will be permitted to vote on rate actions concerning the movement of cargo in that area and that those carriers directly serving the respective trading areas will be sympathetic to the needs of the interested shipper; contends that the number of carriers voting on a rate action is immaterial and that what is significant and important is that the resulting conference can reasonably be expected to eliminate all non-conference competition in all the trades within its coverage; that if this should eventuate the least that the conference should guarantee is a regular responsive panel and procedure for processing shippers' requests and complaints; that the dual rate system be approved in the individual trades as outlined in this proceeding, with appropriate modifications, but that Agreement No. 8660 be disapproved.

United States Borax & Chemical Corporation, An Intervenor, by T. R. Stetson, The Director of Exports, testified generally in support of Agreement 8660. He strongly urged that the dual rate system in this trade be approved; that certain minor modifications in the proposed contracts be made; that the position taken by Hearing

Counsel that Public Law 87-346 requires the fostering and developing of non-conference service in competition with conference carriers is wrong; that Agreement 8660 would make it more likely that non-conference services would be developed; that while there has been some non-conference activities in the past by the Peruvian Line and of other vessels; that even though there has been no regular non-conference operation in this overall trade area the conference has supplied adequate service in years gone by; that the real objective of the new conference and the contracts thereunder is to provide sufficient vessels in order to give adequate service to shippers and to make it worthwhile for shippers and consignees to stay exclusively with the conference; that it is unnecessary for anyone to operate outside the conference or to seek outside service; that shippers on the whole have been provided the lowest possible rates consistent with good service and that this practice will continue; that it is not necessary to develop non-conference services in trade areas which have gotten along with little or none during the past several years and to use the argument that Agreement No. 8660 will preclude non-conference activity has little meaning because there has been little if any non-conference activity during recent years; that maintaining and keeping tariffs up-to-date—they are really useless unless kept up-to-date day by day—is a real job in a sizeable organization such as his company; that this involves a substantial amount of clerical work and that it is altogether possible that the work of keeping these tariffs current and available for ready use would reduce by some 50% the number of tariff pages, provide additional savings in clerical time and also

savings in the subscription price of the tariff to all members; that saving in clerical work in connection with export trade is extremely important; that unification of tariffs would result in more uniform commodity descriptions and would help in overall industry, government, and international programs aimed at standardizing international documentation; that such advantages as these far outweigh any of the possible disadvantages which may be feared by others which to him seem more imaginary or apparent than real; that with the consolidation of these groups into one conference, even though there are to be several "Trade Areas" with voting on rates to each of these areas restricted to member lines actually serving the areas as defined, there will be more uniformity in overall rules and practices; that the carriers will spend less time in meetings, thereby reducing costs, inmproving services and providing better overall effectiveness; that whenever his company has rate or conference problems it is customary to take these matters up with the Chairman of the conference or his assistant and with the member lines; that the doors to the conference officials offices are always open and that they have never been denied the right to put facts and arguments before the members of the conference with the full right of discussion; that Hearing Counsel's statement "failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers requests and complaints" by the Conference is both unfair and inaccurate; that he cannot understand the testimony of witness Battat that he found it necessary to present his company complaints through freight solici-

tors; that the Liberty Gold Fruit Company, Battat's outfit, is located in San Francisco, and the conference officers' offices are in San Francisco; that the people who vote in the conference meetings are in San Francisco and that they are all available if one calls on them; that there is adequate machinery that exists today and will exist under the proposals involved in Agreement 8660 to hear and deal with the shippers' problems and that under the proposed consolidation it would be more efficient because basically there would be negotiations under common rules and greater efficiency would be provided; that Ramond Burley, the Chairman of the various conferences stated the way in which action was expedited by taking telephone polls rather than the waiting for a conference meeting or putting out a rate committee recommendation with a notice that it will become effective on a certain date if no objections are made thereto and that often the requests have been favorably handled in this way simply by forwarding a telephone call to the conferences; that he finds nothing in Section 15 to require detailed procedures for handling shippers' requests to be spelled out in the basic conference agreement; that the procedures are readily available to anyone who really wants to take advantage of them and that insofar as he is concerned the statute is met in all respects; that he interprets the law literally to mean where it speaks of procedures for "properly and fairly hearing and considering" are not meant that the shippers' requests must always be granted because if this were so, no conference would ever be able to comply in all respects, but on the contrary, that fair procedures have already been set up to insure that a

request will be thoroughly considered; that his Company has always been fairly treated; that if the conferences and their shipper patrons are to be tied down to a fixed and stereotyped procedure for handling rate adjustments instead of the adequate informal procedure now readily available, and to be used in the new setup under Agreement 8660, then flexibility in meeting foreign competition will be greatly reduced.

Pacific Coast Coffee Association, an Intervenor, through Robert C. Powell, Chairman of the Steamship Committee of the Association, contends that Section 14(b) of the Shipping Act 1916 now provides certain safeguards for shippers and receivers which must be met before a dual rate system can be used in any particular trade; that the issues in this proceeding which the Intervenor is primarily concerned are whether the Commission should permit the use of the proposed dual-rate systems which he claims has presently eliminated all non-conference competition and where the conferences presently operating have failed to produce stability in rates and services; that should the Commission permit the Conference to increase the strength and power of their members by authorizing ten existing conferences to consolidate into a single conference and if the dual-rate system is to be permitted should the Commission approve a receivers dual-rate agreement which place serious obligations on the receivers then the carriers in return would be obligated to do practically nothing; that the Coffee Association is a trade organization of some 60 odd firms engaged in the importation of coffee on the Pacific Coast; that the views of the coffee association expressed primarily through Mr.

Powell, may be generally summarized as follows: The Commission should not permit the use of any exclusive patronage agreement in any of the trades involved in this proceeding involving the importation of coffee because it is contrary to the public interest and such agreements would be detrimental to the commerce of the United States; that the Commission should disapprove Agreement No. 8660 because such agreement would not be in the public interest and finally, if the Commission should conclude that the dual-rate system should be authorized on coffee in any of the trades involved in this proceeding it should require the proposed dual-rate agreement to be changed as suggested by the Coffee Association; that coffee is the largest import to the Pacific Coast in dollar value—in 1962 approximately 250,000 tons of coffee with a value of about $140,000,000 were imported to the Pacific Coast of the United States and Canada; that in the Latin American trades where the dual-rate system has applied, the Pacific Coast coffee industry has suffered a steady increase in its competitive rate disadvantage and that this condition has contributed materially to the shrinking of the area in which coffee from the Pacific Coast can be sold; that during the post war period the conference has increased its freight on green coffee on a number of occasions whereas charges from the same origins to the Atlantic and Gulf Coast have only slightly increased; that this increased disadvantage to the Pacific Coast has resulted from unilateral increases in rates made by the dual-rate conferences without any attempt to negotiate or even consult with the coffee industry before publishing rates; that the interests of the Pacific Coast Importers, signers

of the dual-rate agreement, have been often ignored resulting in the loss of markets by the Pacific Coast coffee industry; that the dual-rate system has been unfair and unjustly discriminatory as between coffee importers on the Pacific Coast and their competitors on the Atlantic and Gulf Coast and furthermore that these results make a dual-rate system unlawful and improper under Section 14(b) of the Shipping Act; that the dual-rate system in the Latin America Pacific Coast trades have not produced stability in rates or services; that frequent fluctuation in the spread of ocean carrier freight charges on green coffee have occurred in recent years; that the dual-rate conferences have not made any effort to cooperate in providing regularity in vessel calls; that when a large block of coffee is available at one or more ports the fighting between the conferences lines for the cargo often results in a "bunching" of vessels at those ports within a few days of each other; that considerable periods of time elapse without service from the same ports and finally it is contended that there is no need for the dual-rate system in the coffee trades herein involved and furthermore there is no justification for a spread between the contract and non-contract rates—that both should be the same and a dual-rate agreement is meaningless; that there is presently no conference competition in trades from Latin America to the Pacific Coast where the dual-rate system applies on coffee; that Agreement 8660 should be disapproved since it would operate to the detriment of the Commerce of the United States, be contrary to the public interest and be unjustly discriminatory and unfair as between importers; that the ten presently existing conferences would be

superseded by the new conference formed under Agreement No. 8660, where five are exclusively northbound and four are exclusively southbound; that this would create a conference even stronger and more powerful than the existing conferences; that it would make it easier for the conference lines to take unilateral action which would be detrimental to the best interests of the Pacific Coast Coffee Industry and that the dual-rate system, if permitted, would spread the unfortunate experience which the coffee industry on the Pacific Coast had had under the existing dual rate systems to an even wider area; that the matters would become even worse if a larger number of conferences were made into one; that this conclusion is arrived at by virtue of the failure of the individual conferences in the past to negotiate or even consult with the coffee importers; that a single conference would become more powerful and would therefore have a tendency to disregard the wishes of the coffee importers; that in the past the carriers serving a particular coffee trade route have controlled the rates and other affairs in that trade route; that, should Agreement No. 8660 be approved, all members of the new conference would have a vote on all matters in every trade route, including the conference except rate matters affecting only a single trade area as defined in the agreement; that carriers not serving a particular trade have no interest in the problems of the coffee industry in that trade and if they do not serve any coffee trade they have no interest whatever in the coffee industry; that voting rights in a particular trade should be limited to the carriers serving that trade; that it would be contrary to the public interest and detrimental to the commerce to allow as many non-serving lines to vote as would be the

case under Agreement No. 8660; that it is illogical to group such dissimilar goods, such as coffee, raw agricultural products and the like, with different shippers in one conference; that the uncooperative attitude of the existing conferences should not be rewarded by allowing them to combine ten conferences into a more powerful single conference with carriers not serving a particular trade area exercising substantial power, and in some instances controlling the voting rights in such trade areas; that if the use of the dual rate system is permitted in the trades involved in this proceeding the Commission should require that certain changes be made in the form of the Receiver's Rate Agreement which has been proposed by the Coffee Association.

The contentions of the parties in interest to the extent that they are material and relevant will hereinafter be discussed and disposed of in the body of this opinion which follows.

AGREEMENT 8660

Respondents' Position

Agreement No. 8660 was proposed in order to bring about substantial administrative savings to the member lines involved; to permit increased regular liner service to the trade area; to encourage conference membership by reducing the costs of joining the conference; to simplify tariffs, and to provide greater stability of rates in the commerce by water between the West Coast of the United States and Canada, and Latin America.

Respondents contend that it is not necessary that the lines establish the fact that the Agreement has definite

advantages and will promote the commerce of the United States, but on the contrary the test of whether an agreement should be approved by the Commission pursuant to Section 15 is set forth in that provision itself in clear and precise language; that Section 15 requires the Commission to approve all agreements filed for approval except those which the Commission affirmatively finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of the Act; that the Shipping Act was enacted to permit conference agreements to be entered into because of the obvious and definite advantages which flow to the U. S. shipping public as a result of lines operating through the conference system. See, e.g., Alexander Report[6] Volume 4, pp. 295-303: That Congress authorized the Maritime Commission to disapprove only those agreements as to which affirmative findings could be made that the agreement would operate to the detriment of the commerce of the United States; that this approach to the consideration of Section 15 agreements was affirmed by the enactment of Public Law 87-346. See *Senate Report* No. 860, 87th Cong., 1st. Sess., pp. 16-18 (1961); and finally that no finding can be made on the record in this case that Agreement 8660 would operate in the prohibited fashion spelled out in Section 15. But, on the contrary, the record affirmatively shows that this new Agreement will promote

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[6]Report on Steamship Agreements and Affiliation in the American, Foreign and Domestic Trade, Report of the Committee in the Merchant Marine and Fisheries, 63rd Cong., 2d Sess. (1914).

the commerce of the United States and operate in the public interest.

DISCUSSION AND FACTS

A witness of Consolidated Foods, an important shipper in the South American trade, stated:

> "We wholeheartedly support this simplification of conferences, and would support the proposed Conference Agreement No. 8660 in any way possible."

The export manger of DeMartini Company, another important shipper, stated that insofar as his company was concerned, Agreement 8660 would definitely be of benefit to the carriers by eliminating duplication and that as a shipper his company had no objections to the Agreement.

James W. Baker, Vice President and Treasurer of California Cedar Products Company, testified that Agreement 8660 was "absolutely" in the best interest of his company and that his company as a shipper supports the proposed conference because it assures rate stability and regularity of service.

Russel de Lopez of the Georgia Pacific Corporation, testified that his company was in favor of approval of Agreement 8660 and that it was a "very logical move".

Frank L. Merwin, General Traffic Manager of American Smelting and Refining Company, stated that while he reserved judgment on any other combination of conferences, he was in favor of the consolidation sought by Agreement 8660 as it applies to "this trade".

T. R. Stetson, Director of Exports of U. S. Borax and Chemical Corporation, stated that his company was firmly

in favor in Agreement 8660, although he suggested certain modifications of the rate agreement thereunder. In addition, there were a number of other vitally interested shippers who affirmatively testified in favor of the proposed single conference in the Latin American trade covered by Agreement 8660. The reasons for this support were compelling, even though there were a limited number of witnesses who expressed "concern" as to what might happen if a "super" conference came into being. Their real concern, however, appeared more imaginary than real.

The new conference would create a simpler tariff and administrative operation which would cut costs for lines and shippers alike. Mr. Stetson said:

> ". . . I think this proposed consolidation is a tremendous step in the right direction towards the simplification we are working for and will simplify our operations and save us money . . ."

The new conference will provide the shipping public with greater service and stable rates—advantages of prime importance in the development and promotion of trade between the United States and Latin America—which was acknowledged by many witnesses.

As to service to be provided by the conferences carriers, witnesses representing the steamship lines testified that member lines of the proposed conference would be in a position under the new Agreement to provide greater service to shippers. Charles A. Reali, representing Westfal-Larsen Line stated:

> "And we [Westfal-Larsen Line] are non-members, for instance, of the northbound conference from the West Coast of South America, but in view of the de-

veloping area in southern Chile, which is not presently served very often by steamship lines, we could pick up cargo in southern Chilean ports for the Pacific Coast on the southbound voyage.

". . . aside from the fact that the steamship carriers not presently serving certain trades could serve these trades, [Agreement 8660] would be a distinct advantage to the shippers and/or receivers, also, because they would get more frequent service. ". . . it would . . . reduce the amount of work involved in filing ten separate tariffs . . . as compared to one."

On the question of stability of rates, the new conference will permit and encourage lines to operate as conference members throughout the trade area involved, and result in a greater stability of rates throughout the trade areas involved. Raymond F. Burley, the Conference Chairman, described the potential disruption to stability of rates by the operation of ten separate conferences in the following manner:

"One of the weaknesses of our present setup was that there were so many individual conferences that a line may choose as to which conference they will belong to and which they won't belong to, and as I have said earlier, the steamship business is a rugged business and steamship agents and owners are at times opportunists. If business is bad on the principal route, and of course Latin America is an intermediate, and there are only four of our lines that really are complete operations with the Latin American, and these carriers who use them as an intermediate area, they are susceptible to cargo offers in an area where they won't belong to the conference. Consequently we experienced a rather onerous situation where a line

would be a member of one of our Latin American conferences, and being a non-conference line in another part of the Latin America trade. It made it very difficult to champion the cause of the contract rate system with the shipping public when I represent a line that is a conference line to one area, and a non-conference to another. It makes us look pretty hypocritical. And of course, such actions disturb the rate structure, and we just felt that it seemed to us that lines that chose to operate in the Latin America trade, they ought to operate as conference members in all Latin America, and not be able to pick and choose.

Now, as far as the shipping public is concerned, they have been continually mystified as to why there are so many shippers' rate agreements, and our carriers have been confronted with the extremely difficult job of checking the type of shipment to make certain that this shipper has a shipper's rate agreement and that one has a shipper's rate agreement and the amount of paper work and the amount of checking on the part of both the shipper and carrier has just been tremendous. Many times shippers have made shipments and have thought they were dealing on a contract rate, and then find that is one conference that they don't have an agreement with. It just seemed to us that our whole situation could be handled a good deal better by creating the type of agreement which has been assigned No. 8660."

Thus, I find that Agreement 8660 will bring to carriers and shippers the advantages which Congress intended to preserve by permitting conferences to be formed in the foreign commerce of the United States and there is insufficient record evidence to show the disadvantages which would contravene the requirements of Section 15.

In general, Hearing Counsel's objections to Agreement 8660 revolves around the possibility that the new so called "super" conference will (1) drive up rates which place U. S. shippers at a competitive disadvantage and (2) destroy shipper "flexibility", whatever that might be. These objections have little, if any substantial support in the record.

The question of whether the new conference will drive up rates is not a question within the scope of this proceeding, nor is it possible upon this record to make a finding of fact that the new conference will drive up rates even if this were to be considered a relevant and material issue.

To be sure a conference by its essential nature is a rate-fixing group, and the advantages which flow from the type of agreement which the members enter into involves international commerce by water—regularity of service and stability of rates—have been historically proven to be generally advantageous. Speculation as to what rates might be charged is not a proper consideration and, even if it were, the record in the present proceeding shows rather clearly that the new conference will not result in higher, non-competitive rates.

In addition, there was no convincing showing that would support any reasonable conclusion that the new conference would place shippers and consignees at a competitive disadvantage, or otherwise be detrimental to the commerce of the United States. On the other hand, witnesses testified in persuasive fashion that the new conference would be in a better position to work with shippers and consignees to place the shippers and consignees in a competitive posi-

tion; that they saw no reason why the satisfactory relationship which exists between their companies and the present conferences would change with the new conference; that there was no basis for believing that the new conference would result in rate increases; that shippers were rarely, if ever, dissatisfied with rates established by the 10 separate conferences and that there was no basis for saying that the situation would change under Agreement 8660.[7]

Hearing Counsel, in his brief, states that the "super" conference will be an "even stronger monopolistic union" and will eliminate all non-conference competition. This contention has no basis in fact in the record.

The new conference will have no greater concentration or centralization of power than exists in the present set up and which is necessary to do the job required. In fact, the new conference will not be any larger in geographical scope than numerous conferences which have operated under approved agreements for many years, such as:

1. The Trans-Pacific Freight Conference, (Agreement No. 14-1), covering freight traffic from Hong Kong, Canton, Amoy, Foochow, Swatow, and all other ports in China south of and including Foochow, Formosa, Indo-China, and Siam to U. S. and Canadian Pacific Coast ports and to Honolulu, Hawaii.

[7] In support of this position see the testimony of witnesses Briody, General Traffic Manager, Cerro Sales Corporation; Hukins, Traffic Coordinator, Bunge Corporation; Mangan, Manager Traffic Department, Johns-Manville Corporation; Merwin, General Traffic Manager, American Smelting and Refining Co., all of New York City, and others, favored the proposed new conference.

2. The Far East Conference (Agreement No. 17), covering freight traffic from U. S. Atlantic and Gulf ports to ports in Japan, Korea, Taiwan (Formosa), Siberia, Manchuria, China, Hong Kong, Indo-China, and the Republic of the Philippines.

3. The Association of West Coast Steamship Companies (Agreement No. 3302), covering freight traffic from Pacific Coast ports of Colombia and Ecuador to Cristobal and Balboa; to U. S. Atlantic, Gulf and Pacific Coast ports (including Alaska); and to all other destinations, except those under the jurisdication of the European/South Pacific and Magellan Conference; also between ports in Colombia and/or Ecuador.

4. The Pacific Coast European Conference (Agreement No. 5200), covering freight traffic from U. S. Pacific Coast ports to ports in the United Kingdom of Great Britain and Northern Ireland, Ireland, the Scandinavian Peninsula, Continental Europe, including ports on and in the Baltic and Mediterranean Seas, as well as the seas bordering thereon, and French Morocco, and to the Atlantic Islands of the Azores, Madeira, Canary and Cape Verdes, and by transshipment at the aforementioned ports to ports in South, West and East Africa.

5. The Associated Steamship Lines (Agreement No. No. 5600), covering freight traffic from the Philippine Islands direct to, or via ports in Ceylon, India, Pakistan, Malaya, East Indies, Indo-China, Burma, Siam, Hong Kong, China, Korea, Japan, Siberia, United States of America, Canada, Cuba, Mexico, Central America, Canal Zone, South

America, Caribbean Sea Port, West Indies, Australia and New Zealand.

The new conference, it might be noted, while consolidating the areas now covered by ten conferences, provides for a unique voting structure designed to benefit the general public as well as the steamship industry. The member lines of the conference will be entitled to vote on rate matters only in those trade areas which they serve.

Hearing Counsel also states that the new conference will drive up rates since the new conference will eliminate all non-conference competition. This contention is inaccurate. Convincing witnesses with extensive backgrounds in shipping affairs, testified that Agreement 8660 would not eliminate non-conference competition; that they could not conceive that shipping lines "would lay down any rules which would eliminate non-conference competition"; that non-conference competition would always be there (present) "if a trade requires it"; that the only way non-conference competition could be eliminated would be for the United States Government to forbid it, but that the new conference would cause an increase in non-conference competition.[8]

There always have been, and there always will be, competitive forces at play to be considered by the conference lines, whether the competition comes from within the trade through non-conference operators or from carriers serving the common destination from without the trade area.

[8]See testimony of Merwin, American Smelting Co. and Whitmore of Centennial Mills, Inc.

These competitive forces were described by H. K. Grady of Moore-McCormack Lines as follows:

"Q. . . . Now, could you tell us whether or not there is competition by other steamship lines other than the steamship lines who are members of the conferences involved in this proceeding?

"A. . . . We have our greatest competition from the Pacific Gulf ports and the Atlantic ports, because the local exporter here is competing with the exporter in those areas, and if he is priced out of the market by higher freight rates he isn't able to export, and we are interested in increasing the exports from this coast to the ultimate to serve this particular service.

"Q. Now, the vessels that operate from the Gulf and Atlantic Coasts of the United States, are they all Conference or are there some non-Conference?

"A. There are both Conference and non-Conference carriers.

"Q. And you would consider then that you could have competition from both Conference and non-Conference carriers from the Atlantic and Gulf Coast to common destinations in Latin America?

"A. That is correct.

"Q. Now, do you find that you have competition from Conference and non-Conference vessels from other places in the world to common destinations in Latin America?

"A. Yes, there is that competition, but that, as I said earlier, has to be considered a minor degree.

"Q. And I believe you testified that the competitive forces at play as a result of Conference and

non-Conference carriers, from the Atlantic and Gulf coasts to common destinations in Latin America, have an effect upon the level of rates off the West Coast of the United States?

"A. Oh, very definitely."

In addition, Edward Walker an officer of Grace Line testified that there has been serious non-conference competition in the trades involved in this proceeding which has caused conference carriers to reduce the number of sailings in the trades. Although the argument is made by others to the contrary, there is no convincing record evidence showing that this non-conference competition will dissolve upon the formation of the new conference under Agreement 8660.

The basic interest of all carriers, including the Latin America/Pacific Coast Steamship Conference, is to promote, not impair, the commerce of the United States. The special trade development bureau of Moore-McCormack Lines, a prewar creation, illustrates the efforts by individual conference members to bring about an increase of exports and imports in the commerce of the United States. Conference lines want more cargo to carry and they realize full well that the rates must be at a competitive level which permits the cargo to move in volume. The overall record in this proceeding shows that the member lines of this proposed conference will, as they have in the past, attempt to agree upon competitive rates satisfactory to the shipping public. It would simply be folly to do otherwise.

Hearing Counsel argues that shippers and consignees want "flexibility", i.e., the right to choose between con-

ference and non-conference service in each of the trade areas now covered by the ten existing conferences. There is simply no convincing testimony to show that anyone has any serious intention of using non-conference service in the future.

It may be concluded from reading the testimony of certain witnesses that a shipper might want to ship non-conference if the conference rates are not competitive, yet shippers generally testified that each existing conference to which they belong treats their rate requests satisfactorily and that the present rates of each of the existing conferences to which they belong are reasonable, i.e. at a level which does not place them at a competitive disadvantage; that they could not say that Agreement 8660 would encourage higher freight rates; that no valid reasons could be given that the new conference would depart from procedures to meet shipper needs which the vast majority of shippers have found to be satisfactory in the past.

Finally, Hearing Counsel's allegation that the new Conference would be a "stronger monopolistic union" which would destroy shipper flexibility is without persuasive support in the record. The main thrust of the Pacific Coast Coffee Association's opposition is that these importers believe that they should pay the same or less freight as paid by their competitors who import to East Coast and Gulf ports. This may be desirable from the Coffee Association's point of view, and even from the point of view of the carriers, yet it is not a matter which can be solved by the West Coast carriers since they have no control over their competitors carrying cargo to the East Coast and Gulf. The best that can be done by the

West Coast carriers is to quote reasonable rates based upon the cost factors which apply to carriage to the West Coast and to attempt to work with the West Coast coffee importers to resolve their problems on a mutually satisfactory basis.

Robert C. Powell, Secretary-Treasurer, E. A. Johnson & Co., San Francisco, a large importer of green coffee and Past President of the Pacific Coast Coffee Association, stated that the coffee importers have no objection to the level of rates as such but to the rate relationship with coffee moving to East Coast and Gulf ports. During cross-examination Mr. Powell testified as follows:

"Q. . . . your objection here really goes to rate relationship, isn't that correct?
"A. That is correct.
"Q. You haven't voiced any objection about the level of rates, as such?
"A. No, sir.
"Q. Members of your association have been treated, then, without discrimination, is that correct?
"A. That is correct."

He further stated that the rate relationship is beyond the control of those carriers who wish to form the new conference pursuant to Agreement 8660. He testified as follows:

"Q. All the Conferences which would be merged into the new Conference, none of those Conferences have control over what rates are set forth for coffee imports to the Gulf and Atlantic, isn't that true?
"A. That is true.

"Q. So this new Conference, or the component Conferences that now exist have not in effect discriminated as against the West Coast, as opposed to the East Coast, because they couldn't have any control over the other side, isn't that correct?

"A. Well, I can only put it this way, that our Conferences here have not recognized that our disadvantages have been increasing.

"Q. Well, you would like to have your rates reduced, isn't that correct, so that they would be in line with other rates?

"A. That they would be competitive, yes, sir.

"Q. The Conference that controls your rates under Agreement 8660 would not be in a position to control the other rates that you want to bring in line, is that correct?

"A. I presume not."

From his testimony there is no showing that the new conference would have any "increased power". Mr. Powell states that his reaction to the new conference was not based upon any specific provisions of the Agreement or a study of what changes might occur, but what he really wanted was an opportunity to "explain their position" as to rates "prior to [the Conference's] announcing an increase". The Coffee Association recognizes the advantages of the conference system covering imports of coffee to the West Coast—regularity of service and stability of rates—and that the coffee importers would have increased service from various ports under Agreement 8660. The following testimony shows that the Coffee Association does not desire to see non-conference competition disrupt the stability of rates which Agreement 8660 will better assure for the shipping public:

"Q. Wouldn't it be true that if you had a situation that would encourage non-Conference vessels in this coffee trade, that first of all the non-Conference vessels offering service and dependability, [less] service and dependability, than the Conferences offer, would probably encourage the booking of cargo by a lower freight rate, isn't that true?

"A. That is the usual way it works.

"Q. Isn't it true that not all of your members of the Pacific Coast Coffee Association could avail themselves of the outside service?

"A. Yes, sir.

"Q. Wouldn't the result be that within your Association here you would have some importers to bring in coffee at a lesser price than others?

"A. There is a possibility.

"Q. Isn't that a situation which I think you have admitted would not be desirable?

"A. It would not be desirable . . ."

The Coffee Association takes the position that it is contrary to "the public interest and detrimental to commerce" to allow "as many" non-serving lines to vote "as would be the case under Agreement 8660".

Actually, "non-serving lines" do not vote on rate matters within the trade areas defined in the Agreement. Article 2 of the Agreement breaks down the coverage of the Agreement into trade areas for the purpose of preserving the "matter of rate-making in each trade area for the lines that actually handle cargo in that trade area". The fact that each carrier in each trade may not carry coffee is not a matter which can be controlled by the Conference Agreement; but on the other hand, there is no evi-

dence that once the new conference is formed that carriers regularly serving a trade area involving the movement of coffee will not carry coffee. Quite the contrary is indicated, i.e., that carriers serving each trade area within the scope of the agreement will lift every type of commodity offered in that area; and, these serving carriers will be the only carriers entitled to vote on rate matters affecting the commodities moving in the trade area.

Ramond C. Burley, the Conference Chairman, testified that the coffee importers "will have a greater number of companies to work with for the movement of their coffee under the Latin America/Pacific Coast Steamship Conference Agreement than they have today".

I find that the procedure for voting as set forth in Agreement 8660 is an improvement over the present system employed by the ten separate conferences—Mr. Burley states:

> "Now, through this restricted voting group for a trade area I look forward to our ability to make freight rates and serve the public in a more expeditious fashion than we are able to do today. As it is now, with so many members in some of our conferences, we must function through committees, and they make recommendations, and then time must elapse for the committee members to review the committee's recommendations and then advise us whether or not they concur."

It is necessary, and provision has been made therefor, to give all members of the proposed conference a vote on matters of general interest, excluding rate matters, so that the conference can operate as a cohesive group of lines to

better promote the commerce between the United States and Latin America. In rate matters, which are the primary and perhaps sole concern of the Coffee Association, only lines actually serving the trade areas involved will have a vote.

The coffee importers have been and continue to be dissatisfied, yet this dissatisfaction is based primarily on the alleged rate disparity between imports to the West Coast and imports to East Coast and Gulf ports. This is a problem which cannot be solved by the West Coast carriers alone. It is believed, however, that the lines under Agreement No. 8660 will assist in bringing about such a better solution. The Conference Chairman testified:

> "If Agreement 8660 were approved, what are now five separate conferences would be two trade areas. Individually, as Conferences, we have no way of approaching the problem of rate relationship with the Atlantic and Gulf rates. We received a very definite warning from the Federal Maritime Commission in Docket 883, coming out of the [C]eller hearings, that any attempt on our part to interfere with Conferences on the East Coast as to rate relationships was highly improper and illegal, and unless it was covered by some section 15 Agreement, I don't know just what could happen unless it were some complaint case where there might be some governmental edict that stated that the rate from these various coffee producing areas, other than Brazil to the Pacific Coast, would be related in some degree more or less to the rates from the Atlantic and Gulf, but I do believe that if we had Agreement 8660 and the Latin America/Pacific Coast Steamship Conference as a unit, rather than individual Conferences, that it would be to the advantage of both the coffee association and

ourselves, if there is any possibility to use that as a more cohesive unit to try and reach some type of understanding on the matter of rate relationship.

It should be noted that during the course of the hearing in San Francisco that Agreement No. 8660 was amended so that trade area E (Page 1) now encompasses East Coast ports of Central America and Mexico.

There is abundant record evidence to show, and I therefore find that Agreement No. 8660 does not violate any provisions of the Shipping Act and pursuant to Section 15 thereof the said Agreement should be approved.

THE PROPOSED SHIPPERS' AND RECEIVERS' RATE AGREEMENTS

Preliminary Statement

Further amendments to both the Shippers' and Receivers' Rate Agreements were made at the hearings in the following manner:

Article 3—(Page 2)—By the addition of an exception reading: "and (e) Shipments of commodities for which contract rates are not provided in the tariffs of the carriers."

This amendment was apparently made to show that contracts would only be applicable on those commodities on which a contract rate is offered.

Article 8—(Page 6)—Rate Reductions—Previously the last paragraph of Article 7 was made a separate article. Subsequent paragraphs were renumbered.

The contract forms (Shipper and Receiver's) Rate Agreements which are to be used by the Latin Amer-

ica/Pacific Coast Steamship Conference (Agreement 8660) were filed with the Commission for approval pursuant to Section 14b of the Shipping Act. The respondents have, in interests of uniformity and simplicity of administration, proposed the same contract form for two additional trades not encompassed within Agreement 8660.[9]

The present contract forms appear to be the product of careful thought and study which the majority of contract shippers in the relevant trades feel is an effective and fair rate agreement.

Respondents oppose what they term "stylistic revisions" of language and the flurry of suggestions made by others for "improvement" in the rate agreements which are being presented as they say, not as matters which the law requires, but which the particular offeror feels desirable, that while they do not take any particular pride of authorship in precise wordings, and conceivably in certain cases a clause could be differently phrased, nevertheless, respondents do not believe they should be required to change their form as proposed unless real need appears. I concur, for under sound regulatory principle, agreements satisfactory to the parties and not clearly forbidden by applicable statute, are entitled to the most favorable consideration, and should not be interfered with except upon plain showing that such action is required, or at the very least, highly desirable in the public interest.

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[9]Association of West Coast Steamship Companies (ASSWESTCO) (Docket 1018), Pacific Coast River Plate Conference (Docket 1057). Respondents have agreed to substitute the present forms for all of the diverse agreements presently employed in the trades covered by Agreement 8660.

Much of the language employed in the proposed contract form was consciously patterned after the earlier, supplanted contracts, in an effort to retain the type contract with which shippers as well as carriers in these trades are familiar, thus avoiding unnecessary confusion. This is highly desirable.

Respondents contend that compliance with the various requests for modification, from all sides, would, in many instances, require a degree of legerdemain beyond anyone's facilities, as the various suggestions are mutually exclusive, and that even where the proposed suggestions do not actually conflict with one another, inclusion of all of them would make a contract form cumbersome and at least double the present length, to the material detriment of both clarity and comprehension.

Respondents are entitled to have their form—not some other—considered for approval. The legislative history of the Senate version of Public Law 87-346, which become the law, is germane:

> "Your committee believes that if the eight specific requirements set forth in its amendments are met by the proposed contract, it should be entitled to Commission approval unless the Commission finds that the contract would be detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair. We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair." Senate Report No. 860.

SPECIFIC STANDARDS

The eight specific standards of the Act will hereinafter be discussed.

Section 14(b) (1) Notice and Release

Hearing Counsel would require that release time be set out in specific terms. Respondents' Chairman states that "the term reasonably prompt best meets the demands of the trade." It might be argued that Congress did not intend a specific time period, since Congress has in many places demonstrated its ability to state specific time periods where it has wanted to. In fact, a specific time period for release was suggested to Congress in the hearings which led to Public Law 87-346, but rejected by Congress in the final version of the law. The term "reasonable" is a term well known to lawyers, and businessmen, and quite customary in contracts, and has real meaning under a given set of circumstances. In a specific case, a decision must be made as to what precise time is "reasonable", but since all the circumstances of each specific case cannot be predicted, the contract can only properly set forth the general standard under which all specific applications, in their many varied forms, must subsequently be resolved. Respondents' Chairman testified to this, shipper intervenors testified to this, and shipper and carrier alike expressed a desire for flexibility. The needs of one particular shipper for release will in each instance depend on any number of variables.

There is no record evidence to indicate that a flexible contract providing for a "reasonable" time period, as administered by these conferences in the past, has been any-

thing but reasonably and fairly employed, to the benefit of shippers and carriers alike. Apparently the majority of shippers prefer the flexibility respondents have embodied in Article 6 of the proposed form. It has worked in the past and should work in the future. This provision does no violence to the statute.

Hearing Counsel suggest that the contract be "tightened" so as to indicate that the release afforded the shipper is not a carte blanche release, but rather one solely for shipment on a specific vessel, and while respondents take no strong objection to this, they contend that it is unnecessary. The record will not support a finding of abuse, or even confusion, along this line in the past, and there is no reason to expect it in the future. There appears to be no need to tell the contracting shipper in advance that a release from his contract obligation is intended for limited circumstances only, since he by rights should seek its invocation only in such limited circumstances.

This entire area is one where flexibility has in the past worked fairly, indiscriminately, and efficiently from a business point of view. The statute requires that the contract be one which "permits prompt release". This contract does just that. It meets the statutory requirements.

Section 14(b) (2)—Rate Increases

(a) List of Commodities

Hearing Counsel would require the contract form to be modified so as to state expressly that notices of rate changes are available as a matter of law, by tariff publication, as well as by the contract provision which supplements that public notice. Respondents doubt that shippers

are "under the impression that no other way exists for the receipt of notice of rates and rate changes". The Pacific Coast Coffee Association deems the conference obligation to provide notice of increases "nothing of substance". The proposed modification is unnecessary.

(b) Control of the Carriers

Increases in rates are always within the control of the carrier. Respondents do not feel that any change in the statutory language is required. I agree.

(c) Sixty-day Notice of Rate Increase

Hearing Counsel's argument is directed to the ostensible internal conflict between the initial ninety-day period of guaranteed rates and the sixty-day notice period.

Once the initial ninety-day period has run, the statute requires only thirty days' advance notice of rate increases. This contract voluntarily doubles that notice period. There is nothing in the law which would support a requirement of a period of ninety days.

The conferences, for good business relations, have given and will continue to give as much notice as they can, in many cases far more than sixty days. This is adequate.

Pacific Coast Coffee Association's request for a one-year guarantee of rates—four times the statutory requirement is without statutory requirement or record justification.

(d) "Merchant Termination for Rate Increase"

Hearing Counsel, although endorsing the provision which allows shippers to cancel their contracts on less

than ninety days' notice in the event of a rate increase, objects to the reciprocal right of the conference to cancel. The provision is inserted to cover the situation where a shipper has indicated his lack of acceptance of a rate increase (in accordance with the contract provision) but has not given notice of cancellation. In such a case, and where the conference does not exercise its option to maintain the old rate in force, the shipper cannot be charged the lower, superseded rate and by the same token, he has stated he will not pay the new rate.

Hearing Counsel's "submission" that the first sentence of this paragraph, which requires the shipper to respond to rate increases within thirty days, is an unreasonable provision. The statute does not require a conference to give shippers any time at all to voice their objections; the Conference gives thirty days in which to do so and this is reasonable.

Further pertinent and applicable comments to certain provisions herein

The Panel suggested 90 days' notice to close rates. As I view it, this requirement would be highly confusing. In effect it would force all shippers to speculate on the level of the rates after they were closed. The shippers who guessed right would then get a windfall. In fact it can be persuasively argued that the contract should not say anything about the period of notice for closing rates and leave that to the rate-filing requirements of Section 18.

In Docket 1111—*Dual Rate Contracts,* 1963—*Adjudication of Major Issues* the Panel apparently made its

"findings" and reached its conclusions on the basis of supposition, opinion, views, and what the Presiding Examiners, in the exercise of "fair play" thought to be necessary under the statute. A serious question arises in this Examiner's judgment as to whether any actual adjudication as such has been made which could be the basis for any final order against the use of any of the contract forms submitted. In our present proceeding findings have been made on a full record of evidence from all interested parties, based upon allegations set forth in a specific Commission order.

On the question of "legal right to select the carrier" there is no record evidence in Docket 1092 to show that the Latin American Conferences ever required any shipper to ship on Conference vessels when the shipper did not have the legal right and in the absence of any testimony objecting to the terms of the contract it is hard to say that it does not meet the terms of the statute simply because it does not actually quote the language of the statute. In addition there is no testimony in Docket 1092 to the effect that the rate agreements will require any shipper to do anything that he doesn't have the legal right to do. The Panel appears to have arbitrarily rewritten the terms of the statute for the statute says that a contract may only cover goods as to the shipment of which the shipper has the legal right, and so forth. The Panel appears to have ignored the word "cover". The result is that the contract would "cover" goods where the shipper doesn't have the legal right when he ships on conference vessels so that he enjoys contract rates, but the contract would not "cover" his goods when he ships on a non-conference vessel. It

seems to be a "heads I win, tails you lose" proposition and creates a significant loop-hole.

It seems desirable that any reference in the contract to the "legal right" should be omitted and left to the subsequent operation of law. In any event if it becomes absolutely necessary to cover the subject in the contracts then only the verbatim language of the statute should be used leaving the construction of this legal phrase to future adjudication.

It is interesting to note that the Chairman of the Federal Maritime Commission, on October 25, 1963, in a San Francisco speech before the Pacific American Steamship Association, in part said:

> "We are *not* anti-conference • • • we are *not* anti-dual-rate contract, we are *not* opposed to the enlightened self interest that dictates that the shipping industry combine its efforts to meet its problems and to better serve the public."

It appears to the Examiner that this is precisely what the Latin America/Pacific Coast Steamship Conference proposes to do in this proceeding, and which I find, after a full consideration of the record, is justified.

(e) "Force Majeure"—Surcharges

Hearing Counsel and intervener U. S. Borax both take exception to this provision in the contract form, on the grounds that the law does not permit either cancellation or rate increase on fifteen days' notice.

Respondents' provision, as written, meets the requirements of Section 14b(2), in stating that the emergency provisions will be brought into operation only through

"major contingencies beyond the CARRIERS' control". The matters specified in such a force majeure clause are typically matters beyond the scope of the contract and which normally allow either party to terminate without any notice whatsoever, and respondents, in providing fifteen days' notice, have been more than fair. There is no record showing which would indicate any abuse by any of respondents in the past in the employment of a force majeure clause, although such a clause has been present in most contracts heretofore used by these respondents.

3. Section 14b(3)—"Legal Right"

The wording of Articles 1 and 3 of the proposed contract, taken in conjunction with the statutory requirement of Public Law 87-346, adequately meet the requirement of Section 14b(3). That subsection reads that a contract will be entitled to approval if it "expressly . . . covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier . . .". The contract does just that; by the existence of that statutory provision, the word "his" in the phrase (in Article 1) "all of his patronage" must necessarily mean only shipments over which the shipper "has the legal right at the time of shipment to select," just as the contract must similarly be interpreted so as not to violate any other applicable provision of law.

Respondents' objection to incorporating into the contract the bare statutory language of this sub-section is that the statutory wording is so uncertain as to be quite meaningless; that its total uncertainty invites schemes for the evasion of contract obligations, and at worst, it destroys the whole contract rate system. If, as U. S. Borax states, the buyer always may designate the carrier, it would then appear that the contract shipper never has the "legal right" to select the carrier—regardless of what ability to select he may, on occasion, have upon buyer's

default, and in logical sequence, then, the contract cannot, under 14b(3), cover any of the contract shipper's goods (since as to no goods does he have the "legal right"), and, consequently, he is never entitled to the contract rates. While, it may be that this is not what the statute intends, it is what it says. Respondents feel that the best alternative is to leave the language out entirely, on the legally-required assumption that "his" must always be interpreted so as not to violate the law, and does therefore, meet the "express" requirements of Section 14b(3). At all events, respondents resist the inclusion of anything more than the bare words of 14b(3). The phrasing they contend is unknown to this or any other law, and it is impossible to be sure what it means—if anything. It has never been tested, nor interpreted, by a court of law, nor even by the Commission. Any attempt to "clarify" its meaning are ambitious, to say the least, and such "interpretations", by sheer verbosity, heighten, rather than alleviate, the confusion and increase the possible loopholes for possible contract evaders. This appears to be the FOB/FAS question simply rephrased. Respondents contract has no reference to the "legal right to select the Carrier". No contract could require a shipper to do something he could not legally do. In fact, such language would be surplusage. The legislative language here will certainly create litigation. Under the facts in our present case it might be asked just what law determines the "legal right" of a Peruvian lumber importer or Colombian Coffee exporter? A veritable Pandora's legal box could easily result.

More Specifically:

As stated in both Articles 1 and 2 of the Shippers' and Receivers' Rate Agreements, the shipper or receiver agrees to give all of its patronage to the conference car-

riers and to tender to the conference carriers all shipments of his goods in the trades covered by the Agreement, with certain specific exceptions.

"'*All*' here means exactly that" (Tr. 456, 684).

The signatory is obligated, under the Agreement, to use conference lines exclusively regardless of the terms of sale (Tr. 454, 456, 457). The conference is not concerned with the basis of sale (Tr. 454, 462), and is not telling the shipper how to sell his goods (Tr. 464).

> "All I am saying is that that shipper has a contract with us and that that contract says *all* his shipments, and it means just what it says; he fulfills his part of the bargain and we fulfill our part of the bargain." (Conference Chairman Burley, Tr. 464).

The Conference expects the signatory to live up to his half of the Agreement, and if a contract shipper were faced with a situation in which his buyer demanded the right to ship the goods on a non-conference vessel, the shipper, should he choose to sell on those terms, would be in violation of his contract obligation and would be subject to liquidated damages. In such a case perhaps the shipper should determine "whether he shouldn't cancel his agreement and be a non-contract shipper." (Burley, Tr. 473-4).

> "In that case I think the shipper has to make up his mind whether he is going to play both sides of the street or one side of the street. He either has to make up his mind as to whether or not he is going to live up to his agreement and get the benefit of the contract rate, or be able to sell any way that he wishes in order to take advantage of some quick deal; and in that case, have the non-contract rates when he uses conference lines". (Burley, Tr. 462).

In certain cases it might be necessary for the Courts to determine, as a matter of the law of contracts, whether or not a shipper's shipment was in fact "his". (Tr. 454, 463). However, this is the way the Conference has interpreted the clause "for many, many years," an interpretation which "is thoroughly understood by our shipping public" and under which the Conference has had very little trouble. (Burley, Tr. 464).

Moreover, despite the conceivable possibility that a contract shipper might be required to refuse a sale because his buyer insisted upon making a non-conference shipment, the conference chairman did not know of any case, during his entire experience as chairman, in which a contract shipper, in any one of the involved conferences, was in fact so hampered by his shippers' rate agreement (Tr. 812). The contract rate system, as administered by the Latin American conferences, "has been pretty successful, primarily because of this word *'all'* in our agreements." (Burley, Tr. 455).[10]

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[10]Obviously the proof of the pudding is in the eating for the system used and practice observed by the Latin American Conference was worked well both to the benefit of the conference and the public in general. In Docket No. 1111—*Dual Rate Contracts, 1963—Adjudication of Major Issues* the Panel's views on "legal right to select the carrier" are surprising. Apparently, the Panel attempted to distinguish the matter under the statutory terms from the earlier F.O.B./F.A.S. problems. The distinction is without a difference for it appears that the only thing new in Docket No. 1111 as to this matter is the admission of witnesses that F.O.B./F.A.S. has nothing to do with the actual routing of shipments. A reference to the Examiner's findings in Docket No. 870—*In the Matter of the Pacific Coast European Conference—Exclusive Patronage Contracts* and even before that in Docket No. 764—*Mitsui Steamship Company, Ltd. v. Anglo Canadian Shipping Co., Ltd. et al.* supports this view. It might be indicated paren-

4. Section 14(b)(4)—"Natural Routing"

The fourth proviso of the section requires that the contract must be one which ". . . expressly . . . (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier . . ." Respondents contend that their contract form meets this requirement, particularly in view of the negative phraseology of the sub-section. That is, the contract "expressly . . . does not require" any such diversion of cargo. Nor, does it impliedly do so; that they object to the inclusion of even the bare statutory language for fear of opening up a loophole for the contract breaker; that as with "legal right", it is less than clear what the statute means by "diversion"; that there is nothing in the present record to show that respondents have ever required any shipper to divert his cargo; that actual wording of Section 14b(4), could be read as applying to ports as well as to inland points; that were it so read, it would provide the unscrupulous contract shipper with a means for evad-

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thetically that the Commission has not as yet accepted this conclusion.

In Docket No. 870 it was plain that selecting the carrier was a matter for agreement by the exporter and importer. The Panel in Docket No. 1111 inferentially concedes this to be true. Nevertheless, the Panel, as I read the decision, holds that any contract shipper must be free to avoid an equally valid contractual promise to the conference by agreeing at his convenience with "any person" to provide for shipment on a non-conference vessel. Query: Would not such a rule end the contract rate system?

I cannot believe that Congress in approving shipping conferences and their activities in the past when such conference activities have been in the public interest will now countenance the creation of such loopholes in the contract rate system. It is plain to see that any talk about fostering rate stability on the one hand and, on the other, working for schemes to permit rate-cutting are wholly inconsistent.

ing his conference obligations, in order to ship non-conference; that by demanding service to a non-terminal or other "dog-hole" port not serviced by any member of the conference, but within the conference's range of ports, and by refusing to transport his cargo to the nearest port, he could force release from his contract for no valid reason whatsoever.

The record in this proceeding is silent on any abuse, in this regard, on the part of respondents, and the contract does "expressly . . . not require the contract shipper to divert" his cargo. However, inasmuch as the statutory language does give rise to some uncertainty on this score, the mere use of the language of the statute would be adequate. This should be done since it appears that Congress intended that this matter be covered expressly in the contract.

5. Section 14(b)(5)—Damages

The arbitration rights set forth in Article 11 of the Agreement adequately protect any shipper who contests a conference determination that his shipment has constituted a breach of the contract.

Few assessments of liquidated damages are ever paid in full and respondents favor their own language, giving them the option to terminate the shipper's rights, rather than Hearing Counsel's, which would make such termination automatic in such cases. It is this degree of flexibility which the Conference desires and needs in order to do justice under any given set of circumstances. Hearing Counsel's concern that respondents may apply the contract cancellation provision in some cases and not in

others, is indeed true, and is the reason respondents desire this flexibility. Article 10 permits cancellation upon a second "breach of this Agreement", yet even two or more breaches of some of the more minor provisions in the contract should not necessarily be cause for cancellation.

A non-conference shipment is a breach, but it is conceivable that even the best-intentioned of shippers might inadvertently incur such a contrait violation, and in such a case, his treatment should not necessarily assume the severity of contract cancellation, when measured alongside the willful contract violator. The Conference should have a high degree of discretion entrusted to them. There is no record showing that the numerous Conferences in this trade in the past have abused such discretion. On the contrary, they have been most responsive to their membership needs. There is little, if any, basis for arguing that the desirable elbow-room which this provision affords should be removed.

More Specifically:

In connection with the "Notice, Disclosure and Burden of Proof" requirements, the last paragraph of Article 9 of the Dual-Rate Agrements under 8660 requires the shipper or receiver, upon request, to furnish "complete information with respect to any shipment or shipments" of that signatory's goods in the trade covered by the Agreement. Nevertheless, this clause has never in the past been used as a "fishing expedition", nor will it be in the future. The Conference Chairman never contacts an alleged violator without "some sound evidence" that some-

thing is amiss (Tr. 785-786). Nor is the procedure characteristically followed by the Conference in utilizing this paragraph unduly burdensome to the alleged violator: The alleged violator is first notified, by letter or telephone, that the conference is in possession of information indicating that he made a shipment on a non-conference vessel, with such facts regarding the shipment as the chairman has at his disposal. The innocent shipper normally replies "very promptly and very fully," without "hedging, and it will be open and above-board; the shipper who has a guilty conscience generally won't reply to my letter". If this initial inquiry is not answered for about three to four weeks, the Conference Chairman will send a second inquiry, calling attention to the lack of response, and informing the alleged violator that unless a response is received within, generally, 30 days, there will be "no recourse but to consider that the Agreement has been breached and he would be subject to liquidated damages." If at the end of that specified period no response has still been made, the Conference Chairman will then inform the alleged violator that liquidated damages in a certain amount must be paid by a certain date, again normally an additional 30 days, or else that shipper's right to receive contract rates will be suspended until the damages are satisfied. Up until this final step, none of the rights under the contract will have been suspended (Tr. 786-787). The burden of proof in establishing a breach should rest on the party alleging the breach, namely, the Conference Chairman. As a matter of practice, the procedure outlined immediately heretofore would seem to discharge this burden properly. The shipper is the one

who "peculiarly and alone has the information with regard to his shipment." If he has, in fact, made a non-conference shipment, he will be the one who has the applicable shipping documents, and there is no other place where the Conference could get this information and these documents. The shipper knows, without too much elaboration of details of the non-conference shipment by the Conference Chairman, whether or not he has made such a non-conference shipment. If he has not done so, he should have no reasonable objection to proving that he has not. "In the final analysis, the Conference, of course, must establish satisfactorily whenever a breach has taken place." And, of course, the last paragraph of Article 9 "hasn't anything to do with the burden". (Conference Counsel, as requested by Hearing Examiner, Tr. 787-789).

6. Section 14(b)(6)—Merchant Termination

Article 12 of the Rate Agreement meets the statutory requirement.

More Specifically:

Article 9 of the Shipper's and Receiver's Rate Agreements under Agreement 8660, in the first instance, imposes upon a violator an assessment of liquidated damages. If he pays this assessment within 30 days after notification that such liquidated damages are due and payable, he does not lose any of his rights under the contract. (Tr. 787). Failure so to pay the assessment will result, under the terms of Article 9, in the termination of

the violator's (or alleged violator's) right to the contract rates until the liquidated damages are paid; the violator is still subject to the remaining terms of the dual rate contract, however. (Tr. 782). Finally, should the same person breach the Agreement more than once in any 12 months, the carriers may, at their option, cancel the entire Agreement. To date the present Conference chairman has never had the necessity of exercising that final provision, but its use would depend on whether the offender was habitual or not. (Tr. 779). Flexibility here is desirable, "because circumstances vary in every shipment, every trade area". This provision "has some latitude to cover unusual situations." (Tr. 780). Of course, as an alternative, the alleged violator has the right to give notice of cancellation. (Tr. 783-784).

If a shipper does not pay the liquidated damages as assessed within the required 30 day period, but requests arbitration in accordance with Article 10 of the Dual-Rate Agreement, his right to the contract rates would be suspended pending the determination of the arbitration proceedings. In view of the length of time an arbitration proceeding might go on, it is necessary to impose this suspension in order that all contract signatories are treated fairly and properly. Otherwise the signatory who has "been 100% loyal to the Conference" and who has given all of its business to the Conference would be receiving less than fair treatment. (Tr. 771-772). In the event that the arbitration subsequently determined that the alleged violator had not in fact breached the Agreement, the arbitrator would award damages in the amount which that shipper had paid during the period of suspen-

sion in excess of the contract rates. (Tr. 733; Conference Counsel, at request of Hearing Examiner, Tr. 774).[11]

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[11]The distinguished Hearing Examiner Panel's treatment in Docket No. 1111 of the subject labelled "termination for breach" appears to be unsound. In Docket 870 and in the present proceeding the record is clear that the only effective way to enforce the contracts is to suspend a shipper's right to contract rates immediately upon the breach of a contract. If suspension of contract rates must await the outcome of litigation and an award or judgment on a disputed claim for liquidated damages, the contract would become unenforceable. The present conference so the record shows is just about the only conference that has made serious efforts to enforce these contracts, and the conference has been successful only to the extent that non-contract rates against contract shippers have been assessed immediately after his first non-conference shipment. Thereafter if he wished to arbitrate, the Conference accommodated him, and gave him back his money, if he won. However, it is patent to see that if contract shippers could continue to enjoy contract rates despite non-conference shipments during a long period of arbitration the loyal shippers would have no advantage and would be forced to use the non-conference vessels to protect their own competitive position. Under such conditions it is obvious that it would not be possible to preserve stability.

Furthermore the suggestions that a conference should cancel contracts with several thousand shippers simply because one or two break the agreement is wholly impractical. Only the guilty shippers should suffer the loss of contract rates (see Chairman Burley's comments at pages 779-782).

Apparently the Panel missed the real importance of Conference's being able to suspend contract rates in the case of a violation by a contract shipper. The recent Parsons & Whittemore proceedings, Docket 805, et al. provides an illustration of how long it takes a shipper to arbitrate, (more than 9 years and the end is not yet in sight) if he wants to avoid it. In this case petitioner demanded arbitration of Parsons & Whittemore in the year 1954 and no arbitration has taken place as yet. Apparently Parsons & Whittemore found one excuse after another to delay the arbitration and thereafter began a series of court tests of the arbitration clause which proceeded through the municipal court in New York City, the Supreme Court in New York, the Appellate Division of the Supreme Court, the Court of Appeals and then back to the United States District Court and the United States Court of Appeals before winding up in the lap of the Federal Maritime Commission. If Parsons and Whittemore had received the benefit of contract rates during that entire period one can well imagine how useless that contract rate system would have become. Nevertheless, it appears that this would be the effect of

7. Section 14(b)(7)—"Spread"

Hearing Counsel objects to what he calls the "15% spread" proposed by respondents on the ground that there is little non-conference competition. The spread requested is 13%, not 15%.

The statute requires the Commission to approve a proposed spread (between "ordinary rates and rates charged contract shippers") which it "finds to be reasonable in all the circumstances." It does not appear that the statute uses the presence or absence of non-conference competition as the measure of such "reasonableness". The legislative history shows the reverse to be so:

> "Contrary to what might appear to be a natural inference to be drawn from the language of Section 14(b)(7), the intent of Congress in requiring a finding that the spread is reasonable was not for the purpose of maintaining a degree of independent competition in the picture".[12]

The test of "reasonableness" is the effect on non-contract shippers—and non-conference carriers.

There is a limited amount of unsupported shipper testimony arguing for a lower spread, however, the amount of spread is really the contract shippers' protection. A good reason a contract shipper might want a smaller spread would be to provide him with the oppor-

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the clause recommended by the Panel of Examiners (one of the Panel Members presided over this case and might have recognized the significance of this right).

In our present proceeding there is no testimony against the clause which the conference proposes to use.

[12]See Initial Decision, Examiner Seaver, in Docket 1055-1056 served November 4, 1963 at page 13.

tunity for breaching his contract without suffering economic loss thereby.

The purpose as I view it of Public Law 87-346 is to encourage contracts within which conference carriers and contract shippers can operate to their mutual advantage —not to provide non-onerous escapes for the on-again, off-again shipper. No encouragement should be lent to the contract-evader. Respondents have made a prima facie showing, at least of need for the proposed spread, and absent a showing of fact of injury resulting therefrom, they are permitted to employ the most effective contract system allowable under the law. Unsubstantiated opinion, as expressed by certain of the witnesses, is not sufficient to overcome the prima facie reasonableness of a proposal within the statutory limits. Admittedly, a precise determination of what the spread should be is difficult. If a contract system is necessary, as it is here, and if the system is to be effective, there must be a sufficient spread to make it worthwhile for the shipper to sign and adhere to a Conference contract. It is obvious that too small a spread might make it economically feasible, as Mr. Stetson argued, for him to not sign a contract and to use non-Conference vessels on occasion, even though it meant paying the higher non-contract rate when he could not get non-Conference vessels and had to use Conference ones. This practice would be detrimental to the Conference and to the stability and regularity of service which the Conference now provides. There is real merit in the suggestion that any spread proposed by the Conference is prima facie reasonable unless there is a showing to the contrary. Hearing Counsel's contention that the spread is

too high is based upon a bare assertion that such is the case. He has proposed, and justified, no lesser rate and based upon the record testimony of other informed and interested witnesses herein, I find that under all of the circumstances the spread is reasonable.

8. Section 14(b)(8)—Bulk Cargoes

Respondents have agreed, at shipper's behest, to a clause excluding petroleum products. The law states that the Commission may exclude additional commodities—there is no need for the contract to say so, as Hearing Counsel urges. The contract should reflect such exclusions after they have been made. This is all that is required.

A proposal made by witness Wright of Standard Oil Company of California for a special Clause applicable to all petroleum shippers, reading: "It is also mutually agreed that shipments of the shippers own petroleum products in full or partial shiploads in vessels owned or chartered, in full or in part, by them, or in tank ships, will not be considered a violation of this Agreement". I find that it would be preferable that the Conference continue their present practice of adding the petroleum exemption clause to all Shippers' Rate Agreements executed with the petroleum industry (about ten in number) rather than print this special clause on all contract forms. This fills the statutory needs.

The contract in the present Docket does not exclude any portion of contract shippers' cargoes where petroleum companies are shippers. It is impractical to decline to permit them to use their own tankers. On the other hand, any general exception for "owned or chartered vessels" would likely discriminate against shippers too

small to put together full shiploads. All such exceptions should be based upon particular trade conditions and granted only where the big shippers will not be the only ones able to take advantage of a weak charter market.

9. Section 14(b)(9)—Other Provisions

Trades Covered by the Agreement

In international shipping business the West Coast of North America, including both Canada and the United States, is and has been for many years considered as a single entity in establishing a trade area. Many conferences enter into a single agreement covering both areas, rather than two duplicate agreements—one for the United States and one for Canada. This has been done in Agreement No. 8660 (and in the agreements which will be superseded thereby), and while the Commission's authority does not extend into Canada, it is not shown, nor does this record substantiate, that it is in any way detrimental or "unfair" to the American shipper, or to the commerce of the United States. Indeed, quite the reverse is more likely the case. In another proceeding my associate, Examiner Walter T. Southworth, made these pertinent remarks in response to a similar objection by Hearing Counsel:

> "Of course the contract requires signatories to 'pledge Canadian shipments to the conference' to obtain contract rates from U. S. ports. Why not? Otherwise shippers in a position to ship from either side of the border could ship non-conference via Canada whenever it suited their convenience to do so, with obvious detriment to United States commerce; as the Conference argues in its brief, the dual rate system would be quite ineffective as far as the northwest

ports of the United States are concerned. Shippers not in a position to ship from both sides of the border, while not directly affected by the contract, would be at a competitive disadvantage as against shippers able to play it either way."[13]

The scope of the contract form is consonant with the scope of the underlying agreement.

Carrier Resignation

Hearing Counsel objects to Article 9 of the proposed contract form, which allows resignation and termination of contract service by a vessel's withdrawal from the conference on thirty days' advance written notice, on grounds that "its effect may be inconsistent with the minimum ninety-day guarantee of rates."

The answer in part, at least, is that should the entire conference disband tomorrow, there is nothing which could be shown to be unlawful about that action, regardless of the effectual termination of all concerned contract rate agreements. No carrier is compelled to serve a particular area, in the field of international shipping, and the carrier does not guarantee that it will remain in business—any more than does the contract shipper—during the life of the contract.

The statute does not require that service be guaranteed for ninety days, but only that the rate level shall be.

Breach of Agreement

Hearing Counsel's principal objection is to the third paragraph of Article 10, calling for the shipper to fur-

[13]Initial decision, Docket 1002, November 7, 1963.

nish information with respect to a supposed breach, on the grounds that excessive use of this paragraph might lead to "harassing 'fishing expeditions' ". The record appears to be devoid of any instance in which the right to demand such information has in fact ever been either "disruptive" or "harassing"—except, of course, insofar as an admission of guilt is necessarily an uncomfortable thing.

There is no justification to go through a formal proceeding in each case of alleged breach, since in many cases the information disclosed clears the shipper of any guilt whatsoever. Conference Chairman, Burley's testimony, unqualifiedly supports this position. Then too, no decision can be made adversely to the shipper, based on the material disclosed, except by arbitration, if the shipper demands arbitration. There is ample provision for referral to arbitrators under Article 11, since a refusal to deliver requested documents would be a "dispute" within the meaning of that Article.

Respondents object to the inclusion of U. S. Borax's spelling out of the statutory phrase "less the cost of handling". "Cost of Handling" and "handling charges" are, as U. S. Borax correctly states, entirely different from one another, and the essential differences, in language as well as in meaning, is sufficient to prevent any misapplication along the lines feared by U. S. Borax.

Arbitration

The same parties object to Article 11 of the proposed contract insofar as it might be read to "divest the Federal Maritime Commission of its jurisdiction under the

Shipping Act". The answer to these objections is that it does not, and as a matter of law could not.

Pacific Coast Coffee Association

The Pacific Coast Coffee Association urges the inclusion of a provision that "all rates under the Agreement shall be reasonable", which reasonableness is to be determined by arbitration. There is nothing in the law that requires such a provision. The law of supply and demand largely determines reasonableness; however, in the case of carrier rates, particularly under the contract system, this law of supply and demand is further circumscribed by the need to keep a limited number of "consumers" (the shippers) well satisfied.

The Coffee Association also asks that handling charges be placed under the contract.

A handling charge is not a rate, and cannot be so considered. In any event no handling charge can be increased, by the operation of Public Law 87-346, without thirty days' advance notice, and the carriers, by contract, give the shipper twice this statutory notice on increasing rates, or sixty days.

The Coffee Association asked that a new provision be inserted in the Agreement with respect to the location of the Conference office, since, as they contend, coffee importers on the Pacific Coast have encountered difficulties in dealing with the ASSWESTCO conference which operates from Pacific ports of Colombia to the Pacific Coast of the United States and now maintains its office in the Canal Zone. They assert that no one in the United States

has authority to act concerning Conference matters. Mr. Burley is Secretary of the ASSWESTCO Conference and Chairman of other Latin American Pacific Coast Conferences and conceded that this is a reasonable request. I find that the San Francisco Committee of the Association of West Coast Steamship Companies (ASSWESTCO) consists of those members who service the Pacific Coast. Mr. R. F. Burley is Committee Secretary and is available to the Pacific Coast Coffee Association to discuss any problems they may wish to discuss. This committee can make any recommendations to "ASSWESTCO" headquarters in Cristobal, C. Z., on any matter.

If the Commission approves Agreement No. 8660, and this record abundantly justifies such action, an even better medium is available to satisfy the request of the Coffee Association that rate-making on coffee (and any other commodity) can be conducted on the Pacific Coast. "ASSWESTCO" Agreement No. 8660 as it applies to United States ports could well be cancelled and, instead, traffic from Ecuador and the West Coast of Colombia be added to Trade Area "D" of the Latin America/Pacific Coast Steamship Conference, and on traffic to Atlantic/Gulf ports, the same area added to Chairman Marshall's West Coast of South America Conference Agreement.

Shipping Documents

U. S. Borax objects to Article 5 as requiring shippers "to be bound sight unseen to carriers' documents, which might be changed without notice." Article 5 does not "bind" the shipper to anything, it merely states that

space agreements shall be arranged between the specific transporting carrier member of the conference and the shipper, subject, at such time as booking is arranged, to the terms, etc., of the specific carrier's documents of carriage.

CONDENSED SUMMARY—ULTIMATE CONCLUSIONS

I. Agreement 8660 should be approved:

1. The facts in part which support approval of Agreement 8660:

a. The new conference will bring about increased regular liner service to the shipping public within the trade area covered. (Tr. 44, 105, 374-75, 2336.)

b. The new conference will provide greater stability of rates in the commerce by water between the West Coast of the United States and Canada and Latin America. (Tr. 173-74, 244-46, 377.)

c. The new conference will provide simpler and more convenient tariffs which would result in savings to both the lines and the shippers. (Tr. 44, 271.)

d. The new conference will provide stability of rates within the trade area covered by eliminating the situation which now exists whereby a line may be a conference member in one Latin American trade area and operate non-conference in another. (Tr. 68, 358-59.)

e. The voting procedures to be used by the new conference will permit only lines serving a trade to vote upon rate matters in that particular trade area. (Tr. 370.)

f. The new conference will result in substantial administrative savings to the member lines. (Tr. 44.)

g. The new conference will be a more cohesive unit to work with shippers and consignees to promote the commerce of the United States. (Tr. 2307.)

2. The majority of shipper witnesses either affirmatively supported the approval of Agreement 8660 or at least had no objection to its approval.

a. These witnesses were:

Harold Clark, Consolidated Foods, International Division, (Tr. 1627.);

Russel de Lopez, Puget Sound Division of the Georgia Pacific Corporation, (Tr. 1734.);

Frank L. Mervin, American Smelting and Refining Company, (Tr. 1416-17);

T. R. Stetson, United States Borax and Chemical Corp., (Tr. 265, 271);

James W. Baker, California Cedar Products, Co., (Tr. 1687);

Rugen Holzkamp, DeMartini Co., (Tr. 1683);

Paul J. Giese, European Trading Co. & Coast Supplies Co., (Tr. 1817);

Albert A. Wright, Standard Oil Company of California, (Tr. 2272);

W. G. Wolgamott, Trinidad Bean and Elevator, (Tr. 1604);

Francis McCarthy, F. G. McCarthy Co., (Tr. 1631);

Patrick G. Briody, Cerro Sales Corp., (Tr. 1337).

3. The shipper witnesses who had reservations about Agreement 8660 were either uninformed on the relevant facts or gave speculative or generally unsound reasons for their reservations. For example,

a. Witness Whitehouse testified that the new agreement might destroy shipper flexibility (i.e., to ship conference to one trade area and non-conference to another trade area), but stated that his company had never used non-conference lines and had no intent to do so (Tr. 1224). He also said he did not know at the time he formed his opinion about Agreement 8660 that the new conference would offer shippers' rate agreements which would not cover the shippers' subsidiaries and affiliates; and, that this fact could change his mind. (Tr. 1013)

b. Witness Mangan's primary objection to Agreement 8660 was that it would permit lines to vote on rate matters as to which they had no interest, but this is not the fact under the voting procedures of the new conference. This witness admitted he had not read the agreement before forming his opinion about it. (Tr. 1215)

c. Witness Powell, who testified on behalf of the Pacific Coast Coffee Association, objected to the Agreement because it would result in a concentration of "power", but he stated that the basic dissatisfaction of the coffee importers was the rate relationship between the West Coast and the Gulf and East Coasts, which neither the new conference nor the ten presently existing conferences can alone correct. (Tr.

2005-06) However, the new conference will be in a better position to do so than the ten existing conferences. (Tr. 2307) Finally, Witness Powell admitted that the new conference would provide increased service (Tr. 2010) and that it would be undesirable to have rate cutting in the trade. (Tr. 2016-17)

4. Hearing Counsel's basic objection to Agreement 8660—that it will be a "device" to drive up the level of freight rates—is without justification and generally unsupported by the record. There is insufficient probative evidence to justify such a conclusion.

a. Practically all of the shipper witnesses testified that the existing conferences maintain satisfactory rates and fairly consider all shippers' rate requests. (See, e.g., Whitehouse, Tr. 937; Hukins, Tr. 1082; Mangan, Tr. 1145; de Lopez, Tr. 1742). Even the witness for the Pacific Coast Coffee Association did not object to the conferences' present level of rates. (Tr. 1998)

b. Witnesses could do no more than merely speculate that the present satisfactory rate situation would change with the new conference. In fact, most of the shipper witnesses were convinced that the situation would not change and that the new conference would establish and maintain fair and competitive rates. (See, e.g., Hukins, Tr. 1056; Mangan, Tr. 1217; Briody, Tr. 1354; Mervin, Tr. 1401; Baker, Tr. 1700, 1708; de Lopez, Tr. 1734).

c. The new conference will not be any larger in geographical scope than numerous other conferences

which have operated under approved agreements for many years and, moreover, the new conference employs a unique voting provision which limits voting on rate matters to those lines serving the respective trade areas. This is not only desirable, but a most important consideration.

d. The basic interest of every member line to the new conference is to promote, not impair, the commerce of the United States, and each member line realizes full well that rates must be at a competitive level which permits the cargo to move in volume, otherwise cargo would not move. (Tr. 173-74, 2225-26, 2227-28, 2265-66).

II. The proposed Shippers' and Receivers' Rate Agreements Should be Approved under Section 14(b).

1. The proposed agreements, subject to the modifications noted hereinbefore, meet the general standards set forth in Section 14(b):

a. The testimony given by the carrier witnesses and by the majority of the shipper witnesses fully supports a finding that the proposed agreements will maintain stability in rates and services in the trades involved.

b. This testimony is abundantly clear and the findings herein made show that the proposed agreements are necessary for the survival of the conference system.

2. The proposed Agreements, subject to the qualifications hereinbefore made, meet the specific contract requirements set forth in Section 14(b):

a. *Prompt Release:* Article 6 of the Agreements, providing for release of the Shipper (Receiver) when the conference is unable to provide "reasonably prompt space for specific shipments when requested", after a 48-hour notice period, "best meets the demands of the trade" (Tr. 703), is either acceptable to or affirmatively preferred by the majority of shippers testifying, and prevents the creation of a loophole for contract evasion. It has heretofore been fairly and reasonably applied, to the advantage of all parties concerned, and there is no reason to predict a different administration in the future, Section 14(b)(1) of the statute does not require the inclusion of a specific release period, but rather only a provision that "permits prompt release"; Article 6 provides just this, and this satisfies the statutory requirement.

b. *Rate Increases:* The second paragraph of Article 7 of the Agreements, incorporating the language of the statute, expressly meets the requirements of Section 14(b)(2); additionally, the provision for sixty-days' advance notice of all rate increases beyond the initial ninety days doubles the requirements of Section 18(b)(2), and is shown by the record to be eminently fair to shippers and receivers.

c. *Legal Right:* The "legal right" language of Section 14(b)(3) is vague and uncertain to the point of meaninglessness; because of its uncertainty it opens a possible loophole for contract evasion, to the detriment of loyal shippers and the entire contract rate system. The submitted Agreements must necessarily be read in conformity both to the statute and to con-

tract law generally. Hence, by confining coverage to the Shipper's (Receiver's) goods, they adequately meet the statutory requirements without incorporation of the disruptive "legal right" phraseology, and provide a more "effective" contract system by excluding that phraseology.

d. *Natural Routing:* The language of Section 14(b)(4) is also uncertain and capable of abuse for contract evasion. There has been no "diversion" demanded by any of the existing conferences in the past, nor any reason to expect it in the future. Moreover, while the Agreements do "not require the contract shipper to divert shipment of goods from natural routings . . .," and particularly in view of the specific wording of this statutory section, the Agreements generally satisfy the statute as submitted. Nevertheless, it is desirable that the statutory language in this instance be inserted.

e. *Damages:* The first paragraph of Article 10 of the Agreement complies with the requirement of Section 14(b)(5); the remainder of the Article is not shown to be unfair nor to violate any statutory mandate, is necessary to the proper operation of the contract system, and is of affirmative advantage to the honest shipper (receiver).

f. *Termination:* The provision for cancellation by either party upon ninety days' notice, contained in Article 12 of the Agreements, satisfies the requirements of Section 14(b)(6).

g. *Spread:* The proposed 13 percent spread is supported by an adequate showing of need therefor, on

the part both of the conference and the loyal contract shipper; there is no factual showing of injury to be occasioned thereby. In consequence, the proposed spread is "reasonable in all the circumstances", as required by Section 14(b)(7).

h. *Bulk Commodities:* The exclusion, in Article 3 of the proposed Agreements, for bulk shipments, satisfies the requirements of Section 14(b)(8), without the addition of any other language.

3. The proposed Agreements, in the remainder of their terms, are not shown to be unreasonable or unfair, and those provisions should be permitted, as submitted, under Section 14(b)(9).

CONCLUSIONS OF FACT AND OF LAW

Agreement 8660 should be approved by the Commission pursuant to Section 15 since no finding can be made that this Agreement will operate to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or will operate to the detriment of the commerce of the United States, or be contrary to the public interest, or in violation of the Shipping Act.

The record in this proceeding affirmatively shows that Agreement 8660 will result in definite advantages to the carriers and to the shipping public. Primarily it will result in increased service and better assurance of stability of rates throughout the Latin American trade within the scope of the conference. It will also reduce carriers' ad-

ministrative costs, simplify tariffs, and provide a more cohesive organization to work with the shipping public in a continuing effort to foster and promote commerce between the Pacific West Coast and Latin America.

The Contract Rate System proposed by the Conference to be formed under Agreement 8660 and the Contract Rate Systems proposed by the Pacific Coast-River Plate Brazil Conference and The Association of West Coast Steamship Companies subject to the modifications hereinbefore set forth should also be approved. The contracts to be entered into with shippers will be fair and effective and will conform with the general and specific requirements of Public Law 87-346.

An order shall be entered in accordance with this decision.

/s/ Edward C. Johnson
Edward C. Johnson
Presiding Examiner

Washington, D. C.
January 7, 1964

Appendix A

Geographical Scope of the Trade Covered by the Respective Conference Agreement

Agreement 6670—Camexico Freight Conference—From West Coast Ports of Central America and Mexico to Pacific Coast Ports of the United States and Canada.

Agreement 6070—Canal Central American Northbound Conference carriage of goods—green coffee except Central America and Mexico—from Colon, Panama City, Panama Canal Zone, and West Coast Central America Ports, to Pacific Coast Ports of the United States and Canada.

Agreement 6170—Capca Freight Conference—from Pacific Coast Ports of the United States and Canada to Pacific Coast Ports of Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Puerto Armuelles (Panama).

Agreement 8390—Caribbean/Pacific Northbound Freight Conference from the Caribbean ports of Cuba, Jamaica, Haiti, Dominican Republic, Trinidad, Windward and Leeward Islands, Barbados, French and British Guianas, Surinam, French West Indies, Venezuela, Netherlands Antilles to Pacific Coast ports of the United States and Canada.

Agreement 7270—Colpac Freight Conference from Atlantic Ports of Colombia to Pacific Coast ports of the United States and Canada either by direct service or by trans-shipment at Panama Canal ports.

Agreement 4294—Pacific Coast/Caribbean Sea Ports Conference from Pacific Coast ports of the United States

and Canada to ports in Barbados, British Guianas, British Honduras, East Coast Colombia, East Coast of Costa Rica, Cuba, Dominican Republic, French Guianas, French West Indies, East Coast of Guatemala, Haiti, East Coast of Honduras, Jamaica, Leeward and Windward Islands, Netherlands West Indies, East Coast of Nicaragua, East Coast of the Public of Panama (except Colon), Surinam, Trinidad and Venezuela.

Agreement 7570—Pacific Coast/Mexico Freight Conference between Pacific Coast ports of the United States and Canada and ports on the Pacific Coast of Mexico, either directly or by trans-shipment.

Agreement 7170—Pacific Coast/Panama Canal Freight Conference from Pacific Coast ports of the United States and Canada to Colon, Panama City, Balboa and Cristobal, either directly or by trans-shipment.

Agreement 4630—Pacific/West Coast South America Conference from Pacific Coast ports of the United States and Canada to Pacific Coast ports in Colombia, Eucador, Peru and Chile.

Agreement 6270—West Coast South America/North Pacific Coast Conference from Pacific Coast ports of Chile and Peru and Pacific Coast ports of the United States and Canada by direct vessel or by trans-shipment at Los Angeles harbor or San Francisco.

Served
March 30, 1964
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

THE DUAL RATE CASES[1]

Proposed dual rate contracts approved as modified herein.

Appearances:

For respondent conferences and carriers: Edward S. Bagley and Walter Carroll, Nos. 1001, 1006, 1053; Ronald A. Capone, and Robert Henri Binder, Nos. 1058, 1059; Robert L. Harmon and F. Conger Fawcett, Nos. 1055, 1056; Leonard G. James, No. 1007; Leonard G. James, Robert L. Harmon and F. Conger Fawcett, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; Seymour H. Kligler, Michael L. Goldstein, and Herman Goldman, Nos. 1026, 1027, 1028, 1029, 1051, 1052; Elmer C. Maddy, Nos. 1012, 1020, 1049, 1101, 1106; Elmer C. Maddy and Paul F. McGuire, No. 1081; John R. Mahoney, Nos. 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2); Paul F. McGuire, Nos. 1042, 1043; David Orlin, Nos. 1015, 1017; Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, No. 1002; Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Nos. 1005, 1023, 1031, 1050; Burton H. White and Elliott B. Nixon, Nos. 1033, 1034, 1037, 1039, 1046.

[1]The cases included in this report are set forth below.

For interveners: Raymond V. Wolf, Ford Motor Company, Nos. 1033, 1034, 1037, 1039; Don A. Boyd, E. I. du Pont de Nemours & Co., and duPont de Nemours International, S.A., Nos. 1012, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1020, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054, 1101, 1106; Donald Caldera, American Export Lines, No. 1081; Edward P. Cotter, D. B. Turkish Cargo Lines and Ipar Transport, Ltd., Nos. 1109, 1110; Paul Daniel, Brown & Williamson Tobacco Corp., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054; James H. Davis, Sun Oil Company, Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054; Maurice W. Fillius, National Association of Alcoholic Beverage Importers, Inc., Nos. 1058, 1059; Jerome H. Heckman, Dow Chemical Co., and Dow International, S.A., Nos. 1012, 1013, 1014, 1016, 1019, 1020, 1021, 1022, 1025, 1030, 1042 1043, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1101, 1106; Jerome H. Heckman and Charles M. Meehan, Dow Chemical Co., and Dow Chemical International, S.A., Nos. 1033, 1034, 1037, 1039; Lawrence D. Hollman, Paul Daniel and James N. Ravlin, Brown & Williamson Tobacco Co., Nos. 1012, 1020, 1101, 1106; James A. Kenney, Government of Pakistan, Nos. 1012, 1020, 1101, 1106; Richard E. Keresey, Esso International Inc., Nos. 1033, 1034, 1037, 1039; Dickson R. Loos, National Industrial Traffic League, Nos. 1012, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1020, 1021, 1022, 1025, 1026, 1027, 1028, 1029, 1030, 1045, 1047, 1048,

1054, 1101, 1106; Robert P. Nash, Esso International Inc., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1101, 1106; James E. O'Boyle, Ford Motor Co., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1026, 1027, 1028, 1029, 1030, 1045, 1047, 1048, 1054, 1101, 1106; T. R. Stetson, United States Borax & Chemical Corp., Nos. 1002, 1003, 1007, 1009, 1010, 1011, 1018, 1035, 1041, 1044, 1055, 1056, 1057, 1092; J. Richard Townsend, Pacific Coast Coffee Association and Pacific Coast Customs and Freight Brokers Association, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; R. S. Trigg, Armstrong Cork Co., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054, 1101, 1106; Burton H. White, North Atlantic Mediterranean Freight Conference, Nos. 1109, 1110; John C. White, American Cotton Shippers Association, and Anderson, Clayton & Co., Nos. 1001, 1006, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1053, 1054, 1101, 1106.

As Hearing Counsel: Frank Gormley and Robert J. Blackwell, Nos. 1033, 1034, 1037, 1039; Norman D. Kline and Robert J. Blackwell, Nos. 1051, 1052; Howard A. Levy and Robert J. Blackwell, Nos. 1005, 1007, 1023, 1026, 1027, 1028, 1029, 1031, 1050; Thomas R. Matias, and Robert J. Blackwell, Nos. 1012, 1020, 1058, 1059, 1101, 1106; Thomas R. Matias, Howard A. Levy, and Robert J. Blackwell, No. 1081; Roger A. McShea, III, and Robert J. Blackwell, Nos. 1015, 1017, 1109, 1110; H. B. Mutter, Howard A. Levy, and Robert J. Blackwell, Nos. 1003, 1009, 1010, 1011, 1018,

1035, 1040, 1041, 1044, 1057, 1092; J. Scot Provan and Robert J. Blackwell, Nos. 1042, 1043, 1049, 1055, 1056; J. Scot Provan, William Jarrel Smith, Jr., and Robert J. Blackwell, No. 1046; William Jarrel Smith, Jr., and Robert J. Blackwell, No. 1002; Harold Witsaman and Robert J. Backwell, Nos. 1001, 1006, 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1053, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2).

Hearing Examiners:

Herbert K. Greer, in Docket Nos. 1001, 1006, and 1053.

Edward C. Johnson, in Docket Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092, 1058, and 1059.

John Marshall, in Docket Nos. 1015, 1017, 1042, 1043, and 1111.

Charles E. Morgan, in Docket Nos. 1026, 1027, 1028, 1029, 1046, and 1111.

Paul D. Page, Jr., in Docket Nos. 1012, 1020, 1101, 1106, 1051, 1052, and 1111.

C. W. Robinson, in Docket Nos. 1013, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1049, and Chairman of the Panel of Examiners in Docket No. 1111.

E. Robert Seaver, in Docket Nos. 1033, 1034, 1037, 1039, 1055, 1056, 1081, and 1111.

Walter T. Southworth, in Docket Nos. 1002, 1005, 1023, 1031, 1050, and 1007.

Benjamin A. Theeman, in Docket Nos. 1109 and 1110.

THIS REPORT INCLUDES THE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACTS IN THE FOLLOWING DOCKETS:

No. 1001—Gulf/Mediterranean Ports Conference
No. 1006—Gulf/French Atlantic Hamburg Range Conference
No. 1053—South Atlantic Steamship Conference
No. 1002—Pacific Westbound Conference
No. 1003—Capca Freight Conference
No. 1009—Colpac Freight Conference
No. 1010—Canal, Central America Northbound Conference
No. 1011—Camexco Freight Conference
No. 1018—Association of West Coast Steamship Companies
No. 1035—Pacific Coast/Caribbean Sea Ports Conference
No. 1040—Pacific Coast/Mexico Freight Conference
No. 1041—Pacific Coast/Panama Canal Freight Conference
No. 1044—Pacific/West Coast of South America Conference
No. 1057—Pacific Coast River Plate Brazil Conference
No. 1092—In the Matter of Agreement No. 8660—Latin America/Pacific Coast Steamship Conference
No. 1005—Associated Steamship Lines (Manila)
No. 1023—Far East Conference
No. 1031—New York Freight Bureau (Hong Kong)
No. 1050—Trans-Pacific Freight Conference (Hong Kong)
No. 1007—Pacific Coast European Conference
No. 1012—Calcutta/U.S.A. Conference
No. 1020—The India, Pakistan, Ceylon & Burma Outward Freight Conference

No. 1101—The Ceylon/U.S.A. Conference (Agreement 8050)

No. 1106—In the Matter of Agreement No. 8650—Calcutta, East Coast of India and East Pakistan/U.S.A. Conference

No. 1013—Atlantic and Gulf/West Coast of South America Conference

No. 1014—Atlantic and Gulf/West Coast of Central America and Mexico Conference

No. 1016—Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference

No. 1019—Leeward and Windward Islands & Guianas Conference

No. 1021—Havana Steamship Conference

No. 1022—Gulf and South Atlantic Havana Steamship Conference

No. 1025—East Coast Columbia Conference

No. 1030—Havana Northbound Rate Agreement

No. 1045—United States Atlantic and Gulf-Haiti Conference

No. 1047—United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference

No. 1048—U.S. Atlantic and Gulf Ports-Jamaica Steamship Conference

No. 1054—Santiago de Cuba Conference

No. 1018 (Sub. No. 1)—Association of West Coast Steamship Companies (Cocoa, Coffee, Ivory Nuts, Ecuador/United States Atlantic-Gulf)

No. 1018 (Sub. No. 2)—Association of West Coast Steamship Companies (Coffee, Columbia/United States Atlantic-Gulf)

No. 1015—Atlantic and Gulf, Singapore, Malaya and Thailand Conference

No. 1017—Atlantic and Gulf-Indonesia Conference
No. 1026—Java-New York Rate Agreement
No. 1027—Java-Pacific Rate Agreement
No. 1028—Deli-Pacific Rate Agreement
No. 1029—Deli-New York Rate Agreement
No. 1033—North Atlantic French Atlantic French Conference
No. 1034—North Atlantic Mediterranean Freight Conference
No. 1037—North Atlantic Baltic Freight Conference
No. 1039—North Atlantic United Kingdom Freight Conference
No. 1042—River Plate/United States-Canada Freight Conference
No. 1043—River Plate and Brazil Conferences
No. 1046—West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference
No. 1049—United States Atlantic & Gulf/Australia New Zealand Conference
No. 1051—Straits/Pacific Conference
No. 1052—Straits/New York Conference
No. 1055—Pacific/Straits Conference
No. 1056—Pacific Indonesian Conference
No. 1058—North Atlantic Westbound Freight Association (Wines & Spirits Contract)
No. 1059—North Atlantic Westbound Freight Association
No. 1081—West Coast of India and Pakistan/U.S.A. Conference
No. 1109—Ipar Transport, Limited
No. 1110—D. B. Turkish Cargo Line
No. 1111—Dual-Rate Contracts, 1963—Adjudication of Major Issues

REPORT

BY THE COMMISSION (John Harllee, Chairman; Thos. E. Stakem, Vice Chairman; Ashton C. Barrett and James V. Day, Commissioners.)

INTRODUCTION

These are proceedings under section 14b of the Shipping Act, 1916 (75 Stat. 762; 46 U.S.C. 813a), for the approval of so-called dual rate contracts used by common carriers by water and conferences of such carriers in the foreign commerce of the United States.[2] Most of the proceedings involve the approval of contracts which were in use at the time Public Law 87-346 was enacted. Under the terms of section 3 of P.L. 87-346, as amended, these contracts are not lawful beyond April 3, 1964.

In this report we have combined the aforesaid contracts for discussion and decision. The full terms of the contracts as approved by us are set forth in the orders appended hereto. The Initial Decisions of the Examiners which preceded this report dealt in most instances with the contracts of several conferences in related trade areas. Certain common issues were severed from some of the proceedings involving specific contracts and were

[2]One proceeding, Docket No. 1092, also involves the approval of a new organic conference agreement under section 15 of the Shipping Act, whereby several presently existing conferences in the Pacific Coast/Latin American trades seek approval of an agreement which would combine the several conferences under a single agreement. The approval of this new conference agreement and such separate discussion of the use of dual rate contracts by this conference as is necessary are set forth at the end of this report.

joined for hearing in Docket No. 1111 before a panel of five Examiners.[3]

Our determination to deal with all the contracts in a single report was prompted by several considerations. In its report on the bill which ultimately became Public Law 87-346, the Committee on the Merchant Marine and Fisheries of the House of Representatives made it clear that insofar as was possible dual rate contracts should be standard or uniform. The Committee said:

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[3]Docket No. 1111 treated the following issues:

Definition of Contract Shipper

(a) Whether the Commission should approve, disapprove or require modification of contract provisions requiring inclusion in the contract of affiliates of the contract shipper or of other connected companies.

Contract Shipper Commitment

(b) To what degree, if any, may or should contracts exclude a portion of shipments, commodities, or shipments on owned or chartered vessels?

Legal Right to Select the Carrier

(c) Whether the provision required by section 14b (3) in all contracts, to limit the coverage of the contracts to "those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier" requires special language in the contracts in order to avoid uncertainty and potential disputes as to the obligations of the merchant, or whether the language of section 14b (3) should be incorporated, verbatim, in the contracts.

Notice, Disclosure and Burden of Proof

(d) Whether the Commission should approve, disapprove or require modification of contract provisions imposing notice and disclosure requirements upon the contract shipper in the event of non-conference shipments or of suspected or alleged breach of contract, and provisions relating to the burden of proof as to whether he has violated the contract.

Termination for Breach

(e) Whether the contracts should permit carriers or conferences to terminate individual contracts for breach or alleged breach of contract by the merchant.

The foregoing issues were severed in the following dockets: Nos. 1001 through 1007, inclusive; Nos. 1012 through 1023, inclusive; Nos. 1025 through 1031, inclusive; No. 1042; No. 1043; Nos. 1045 through 1057, inclusive; No. 1059; and No. 1101.

"It is the expectation of the committee that a standard form of contract to be utilized by all conferences will be approved by the Board with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problem of shippers, who of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions."

(H. Rpt. No. 498, 87th Cong., 1st Sess., p. 9(1961)).

This sentiment was further expressed by the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives in its Report on the Ocean Freight Industry published several months following the enactment of P.L. 87-346.[4] The Antitrust Subcommittee in its recommendations related to Public Law 87-346 said:

"3. The Federal Maritime Commission should establish minimal standards for dual-rate contracts beyond those set forth in Public Law 87-346 and should devise and publish a basic form contract to be used by all conferences. Any deviation from the form should be carefully studied by the Commission to insure that there is no discrimination against individuals or groups or shippers." (Report of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives Pursuant to H.Res. 56,87th Cong. 2d Sess., p. 390, (1962))

A further consideration in the combining of all contracts for a single decision was the fact that the contract

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[4]For the part that the Antitrust Subcommittee played in the enactment of P.L. 87-346 see H.R. Rpt. No. 498, 87th Cong., 1st Sess., p. 6 and Sen.Rpt. No. 860, 87th Cong., 1st Sess., p. 10.

NOTE: There are no footnotes numbered 5 or 6, nor is there a page numbered 6.

provisions which should be permitted in each instance depend for the most part upon construction of the statute rather than upon the peculiar facts of a particular trade. In these circumstances, both consistency and efficiency promoted a single discussion. The fact that a number of individual hearings were held and that there have been a number of initial decisions by several Examiners has furnished us with perhaps a broader background for this decision than would have been the case if but a single hearing had been held.

In reaching our conclusions we have considered the arguments presented in all the cases included herein. We discuss herein those arguments which appear to be of substance. Arguments and exceptions to the Initial Decisions not discussed herein were considered by us and found to be not justified.

BACKGROUND TO PUBLIC LAW 87-346

Public Law 87-346 is the latest event in the long and controversial history of dual rate contracts in the waterborne commerce of the United States. The lawfulness of dual rate contracts was challenged as early as 1922 when our predecessor, the United States Shipping Board, found that the use of such a contract by an individual carrier was unlawful under sections 16 and 17 of the Shipping Act (46 U.S.C. 815, 816). *Eden Mining Co. v Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922).

A few years later an individual carrier sought, under the antitrust laws, to enjoin the use of a dual rate system by a conference of carriers. The charge was made that the system had not been approved by the Shipping Board

under section 15 of the Shipping Act (46 U.S.C. 814) and therefore was open to challenge under the antitrust laws. The Supreme Court found that the matters complained of lay primarily within the jurisdiction of the Shipping Board under the Shipping Act and affirmed the dismissal of the bill of complaint. *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). In *Cunard* the Court made it plain that it was not passing upon the lawfulness of dual rate systems under the Shipping Act. Thus, in answer to an assertion that the dual rate contract there in issue could not lawfully be approved, the Court replied that this was "by no means clear." 284 U.S. at 487.

The following year the Shipping Board again had the occasion to speak on the lawfulness of dual rate contracts. In *Rawleigh v. Stoomvaart,* 1 U.S.S.B. 285 (1933), the Shipping Board found that a dual contract used by a conference of carriers, as distinguished from the single carrier agreement in *Eden Mining, supra,* was not unlawful. The Shipping Board distinguished *Eden Mining* upon the ground, among others, that the conference contract offered the shipper the use of several carriers and therefore, in the judgment of the Shipping Board, was not subject to the same objections as a single carrier system.

The next major controversy over such agreements came when the Department of Justice sought an injunction under the antitrust statutes against a conference dual rate system which had not been approved by the United States Maritime Commission. Again, the Supreme Court held that the matters complained of were within the exclusive primary jurisdiction of the Maritime Commission under the Shipping Act and did not rule upon the law-

fulness of the system. *Far East Conference v. United States,* 342 U.S. 570 (1952).

Finally, the lawfulness of such agreements under the Shipping Act was directly presented to the Supreme Court in *Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. 481 (1958), where a dual rate system which had been expressly approved by the Board was challenged. The Court set aside the Board's approval of the contract system on the ground that it was a "resort to other discriminating or unfair methods to stifle outside competition in violation of section 14 Third" of the Shipping Act, 1916 (46 U.S.C. 812). 356 U.S. at 493.

The Isbrandtsen decision cast serious doubt upon the lawfulness of all dual rates systems; and shortly following this decision Congress enacted legislation to permit, temporarily, the continued use of dual rate systems by conferences organized pursuant to agreements approved by the then Federal Maritime Board.[7] Immediately upon the enactment of this interim legislation the Committee on Merchant Marine and Fisheries of the House of Representatives commenced a study of conferences and dual rate systems. Concurrently, the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives commenced a connected study of certain antitrust practices in the ocean freight industry.

Public Law 87-346 resulted from these studies. It permits the use of dual rate contracts but only if the Commission finds that certain safeguards have been met. In adopting this course Congress, in a sense, reaffirmed

[7]Public Law 85-626 (72 Stat. 574).

the earlier philosophy of section 15 of the Shipping Act which, by authorizing supervised competition-restricting agreements among carriers, recognizes that there is some justification in the water-borne foreign commerce for making exception to our normal antitrust policies.

We will now discuss the specific requirement of the statute, with frequent reference to primary documents of the legislative history of Public Law 87-346.[8] While section 14b authorizes the use of dual rate contracts by both common carriers and conferences of such carriers, we, for convenience, have generally used the term "conference" as including the one individual carrier whose dual rate contract is before us. Further, since section 14b also authorizes dual rate contracts with both shippers and consignees, our use of the term "merchant" generally includes both shippers and consignees.

THE STATUTORY REQUIREMENTS

Before considering the numbered provisions of section 14b which relate to the required express provisions of all contracts there are two general requirements of the section which demand brief preliminary discussion. In

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[8]Shortened citations to these documents are used as follows:
"House Hearings" refers to Hearings before Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4299, 87th Congress, 1st Session (1961).
"House Report" refers to House Report No. 498, 87th Congress, 1st Session (1961).
"Senate Hearings" refers to Hearings before Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, U.S. Senate, on Steamship Conference/Dual Rate Bill, H.R. 6775, 87th Congress, 1st Session (1961).
"Senate Report" refers to Senate Report No. 860, 87th Congress, 1st Session (1961).

generally describing the nature of the contracts to be permitted, section 14b states that the Commission shall permit contracts which are "available to all shippers and consignees on equal terms and conditions" and which provide lower rates to a shipper or consignee "who agrees to give all or any fixed portion of his patronage" to the carrier or conference offering the dual-rate contract.

Under the first of these provisions there is the question of whether the Commission can permit a contract which is offered only to shippers or only to consignees. The phrase "shippers and consignees" appears to have been used in the statute to eliminate any doubt regarding whether so-called consignee contracts could be continued under the statute rather than for the purpose of requiring that all contracts be offered on both sides of the ocean.

As originally introduced, H.R. 4299 (the direct predecessor to H.R. 6775 which was ultimately enacted as public law 87-346) stated that the then Federal Maritime Board could permit contracts "available to all shippers in the trade on equal terms and conditions." In commenting on this provision of H.R. 4299, the Under Secretary of Commerce, speaking for the Maritime Board, suggested that the bill be amended by defining the word "shipper" as used therein to include consignors and consignees. In explaining the motive for this amendment, the Under Secretary said, "many of the exclusive patronage contracts currently in effect are between consignors as well as consignees and carriers. The recommended language would make it clear that such arrangements may be continued and shall be governed by the safeguards erected in the proposed section." (House Hearings, page 6; House

Report, page 17) Presumably in response to this suggestion by the Under Secretary, Draft Revision No. 2 of H.R. 4299 permitted contracts "available to all shippers and consignees on equal terms and conditions." (House Hearings pages 535-536)

Elsewhere in the hearings on H.R. 4299 there is expressed concern on the part of carriers and conferences that the bill as originally introduced might not permit the continuation of consignee contracts then in existence. (See House Hearings pages 177, 357, and 511) Shippers were likewise concerned that the bill as originally introduced might not permit the continuation of their consignee contracts or might not require that the safeguards of the bill be included in consignee contracts. (See House Hearings pages 388-389, 411)

From all this it would appear that the intent of the statute is to permit the continuation of so-called consignee contracts rather than to demand that if a contract is used it must be offered both to the exporter in one country and to the importer in the other country. The decision of whether to solicit contract signatories on both sides of the ocean, like the decision of whether to use a dual rate system at all, will therefore be left to the conference.

Under the second of the above provisions there is the question of whether the merchant must have the option of excluding a portion of his shipments from the obligation of the contract. The proposed contracts fall into two basic categories: (1) those which require the merchant to use the conference vessels for *all* of his shipments (except for commodities expressly exempted by the eighth numbered provision of section 14b) and (2) those which

obligate the merchant to exclusive patronage only for specific commodities. The first type is generally used in the export trades; the second is generally used in the import trades. In this regard the proposed contracts generally are unchanged from those which were in effect at the time public law 87-346 was enacted.

The legislative history of the "all or any fixed portion" phrase of the statute is scant but nevertheless enlightening. As originally introduced, H.R. 4299 dealt only with arrangements whereby a merchant would be given a lower rate if he promised his "exclusive patronage." (See House Hearings p. 1) In testifying on this provision of H.R. 4299, Mr. Edward Bransten of the Pacific Coffee Association criticized the "exclusive patronage" wording because, in his opinon, the statute so worded would not have outlawed 80% or 90% patronage contracts and would not have required that such contracts contain the statutory safeguards. (House Hearings, p. 389) (In this connection it should be remembered that H.R. 4299 first expressly outlawed "exclusive patronage" contracts and then by a proviso permitted the use of such contracts if they contained certain provisons and were approved by the then Federal Maritime Board.) Mr. J. Richard Townsend, appearing as counsel for the Pacific Coast Coffee Association, also explained to the House Committee that, in his opinion, the bill as it then stood would not prohibit conferences from offering contract rates for 80% or 90% of a merchant's patronage but not including any of the safeguards imposed by the bill for exclusive patronage dual rate contracts. (House Hearings, pages 397-398) Mr. Bransten and Mr. Townsend testified before the Com-

mittee on April 10, 1961. Draft Revision No. 2 of H.R. 4299, published on April 13, 1961, changed "his exclusive patronage" to "all or any part of his patronage." (House Hearings, page 536) This language ultimately became "all or any fixed portion of his patronage" in the Senate subcommittee print of August 8, 1961. (Senate Hearings, pages 603-604)

From all this it is evident that the intent underlying the phrase "all or any fixed portion" was not to require that under all dual rate contracts lower rates had to be offered for a fixed percentage of the merchant's cargo. The phrase was intended rather to make it clear that if such fixed portion contracts were offered they would be subject to the same safeguards as "exclusive patronage" contracts. We therefore will not require that conferences permit shippers the option of offering only a fixed portion of their shipments to the conference in exchange for lower rates.

Prompt Release

The first numbered provision of section 14b requires that every contract contain a provision which expressly:

> "(1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contract carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice."

Most of the conferences have recognized the benefits both to themselves and to the contract shippers of defining what is meant by "prompt release." The contracts

of these conferences require that the merchant notify the conference that he needs space for a particular shipment. The conference is then allowed a specific period of time by which it must notify the merchant that space will be available within a fixed number of days from the sailing date requested by the merchant.

A few of the contracts presented in these proceedings contain but the bare words of the statutory provision and merely state that the merchant well be "promptly" released from the contract where the conference cannot provide space for his shipment. Some of these conferences have argued that the fixing of specific times under this provision of the statute is unnecessary because in the past they have always been reasonable in their treatment of merchants. If this be true then there should be no objection to a contract provision which informs each merchant of his rights and fixes with some certainty the obligations of the parties.

In the interest of avoiding future controversies over what, in fact, constitutes prompt release of the merchant, we are requiring that all contracts, by their terms, fix the time period by which the conference must respond to a request for space and the time by which the conference must furnish space. We have permitted some variation in these times among the various trades depending upon what appeared to be the reasonable commercial needs in the particular trade.

Rate Increases

Under the second numbered provision of section 14b all contracts must contain a provision which expressly:

"(2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days:"

Read most literally, this provision of the statute would simply require that rates not be increased more often than once every 90 days. However, numerous witnesses, both shippers and carriers, who testified before the Senate and House Committees during the consideration of H.R. 4299 and H.R. 6775 viewed this provision as requiring 90 days' *notice* of rate increases rather than the bare assurance that rates would not be increased more often than once every 90 days.[9] It was recognized by these witnesses that merchants offering goods for sale in our foreign commerce must know the ocean freight rate well in advance of shipment. A contract which merely assures the merchant that a rate which was increased today will not be again increased sooner than 90 days from today does not meet this need. With the passage of each day under such a contract the merchant has one day less for the planning of future sales and after the running of the initial 90 days the merchant is assured nothing. It appears therefore the overriding intent of the statute and the reasonable requirements of our foreign commerce demand that merchants be given a minimum of 90 days' advance notice of increases in rates. This would seem a reasonable *quid pro quo* on the part of the conference for the merchant's exclusive patronage.

[9]See, for instance, House Hearings pp. 270, 325, and 352-353; Senate Hearings pp. 249, 519, 533, 675, 712, and 719.

In recognition of this practical need of our commerce, a great number of the conferences have included a 90 days' notice provision in their proposed contracts.

Many of these contracts also contain provisions which permit the merchant to give notice of cancellation of his contract effective with a proposed rate increase and, in turn, permit the conference a period of time during which it may reach a decision whether to withdraw its proposed rate increase rather than suffer numerous merchant cancellations. Such provisions have the salutary effect of discouraging rate increases which might be completely unacceptable to merchants and would make it unnecessary that the merchant unqualifiedly cancel his contract upon notice of a rate increase which he found unacceptable. Such provisions would not, of course, interfere with the merchant's statutory right to cancel his contract without cause upon 90 days' notice.

A contract provision which permits merchants 30 days after notice of a rate increase in which to decide whether they will continue under the contract and, in turn, permits the carriers 30 days in which to decide whether the proposed increase should be withdrawn would appear to be fair to both merchants and carriers. In keeping with the legislative intent that the Commission should, insofar as possible, standardize dual rate contracts, we are requiring that all contracts include a uniform clause relating to provision (2) of section 14b. This clause, which is set out below, requires 90 days' notice of rate increases and includes the conditional cancellation provision just discussed. Rate increases necessitated by emergency conditions outside the control of the carriers are permitted

under a separate contract provision which will be discussed below.

In order to dispel any doubt regarding the applicability of section 18(b) of the Act to rate changes under dual rate contracts, we are requiring that all rate changes must conform with section 18(b) (2). The further requirement of section 18(b) that carriers must offer subscriptions to their tariffs is also to be explicitly stated in the required standard clause.

In order to clear up the question of notice to merchants who sign a contract during a time that an outstanding notice of increase is running, the standard clause also states that both rates and notice of proposed rate increases shall be considered to have become effective on their original dates rather than to have become effective with the signing of the individual contract. In order to eliminate the possibility of different notice dates to different merchants, notice is accomplished by tariff publication.

The following clause will be included in all contracts:

> (a) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Merchant, except as provided by Section 18(b) (2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: Provided, *however,* the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the _____

Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however,* that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price, however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Martime Commission rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

Legal Right to Select the Carrier

Under the third numbered provision of section 14b all contracts must contain a provision which expressly:

> "(3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract:"

There are two questions which arise under this provision of the state. Historically, both have been troublesome; neither is easy of resolution. First is the question of the circumstances under which the merchant is restricted to the use of conference vessels for the transportation of goods which he purchases or sells. The second question, which arises indirectly, is the extent to which companies affiliated with the signatory to the contract should be bound by the single merchant's signature. Both of these issues were segregated from most of the cases and were given separate treatment in Docket No. 1111.

The major controversy over contract clauses dealing with the first question concerns the presumptions, if any, which may be drawn by the carriers where the signatory merchant has participated in some fashion in the arrangements for ocean transportation or where the shipping documents list the merchant as either shipper or consignee. Many of the proposed contracts contain language

which would raise a conclusive presumption that the signatory merchant had the legal right to select the carrier if his name appeared on certain shipping documents or if he otherwise participated in the ocean routing or the selection of the ocean carrier. While we agree that these circumstances may suggest that the merchant had the legal right to select the carrier, the statue does not appear to permit such circumstances, and nothing more, to prove conclusively legal right to select the carrier. In short, the statute does not appear to permit a presumption here which would preclude the proof of the true situation.[10]

On the other hand, some recognition of the practical problems which a conference must face in proving that a merchant had the legal right to select the carrier seems desirable. The merchant himself will ordinarily be in sole possession of all the facts which would prove or disprove his legal right to select the carrier. We are therefore approving a contract provision which will raise a rebuttable presumption, as it were, that the merchant possessed the legal right at the time of shipment to select the ocean carrier if he participated in the arrangement for ocean transportation or if his name appears on a bill of lading

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[10]As was brought out in many of these proceedings, letter of credit financing generally requires that bills of lading be taken out in the name of the selling merchant without regard to whether the purchaser may have in fact directed the ocean routing or chosen the carrier. Even absent such testimony, however, we have discovered nothing in the records of these proceedings which would warrant a conclusion that mere participation in the arrangements for ocean transportation or the mere appearance of a name on a bill of lading or other shipping document would themselves prove conclusively that the merchant had the right to select the ocean carrier.

or export declaration as shipper or consignee. This provision is optional with the carriers. Those who desire some provision relating to presumptions may use it. Those carriers that desire no language in the contract relating to presumptions need not include it.

In accordance with the House Committee Report we are also requiring that all contracts expressly state that nothing therein shall require the merchant to forego a sale unless the shipment is made on a conference vessel.[11]

Paragraphs numbered 1, 2, 3, and 5 of the following provision will be required in all contracts. Paragraph number 4 may be used by those conferences which desire a provision which raises a presumption where the signatory merchant is named in the bill of lading or export declaration or participates in the ocean routing.

1. If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.
2. If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.
3. It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder,

[11]House Report, p. 9.

divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

4. For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.

   (a) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

   (b) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.[12]

5. Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

Turning to the second problem presented under provision (3) of section 14b, the legislative history of the sec-

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[12]Because of special circumstances shown to exist in the Hong Kong trades involved in Docket Nos. 1031 and 1050 the following additional language will be permitted in those contracts:

With respect to which merchant participated in the arrangement for ocean shipment beyond the delivery to the ocean carrier's terminal or alongside the carrier's vessel and without in any way exhausting what may constitute subterfuge or evasion within the meaning of Article ____ hereof, the merchant shall be deemed prima facie to have the legal right to select the carrier for any shipment made in fact by such merchant in respect of which the name of any firm or person, being associated with the local agents of a non-conference line appears as the shipper on the relevant bill of lading and any merchant using this subterfuge shall be deemed prima facie to have violated his contract with the carriers.

tion makes it clear that Congress left it to the Commission to specify the circumstances under which affiliated companies would be bound under the contract by a single merchant's signature. Many of the proposed contracts would include all affiliates without regard to the signatory merchant's control over the affiliate. A few contracts bind only the signatory merchant. Others would bind only those affiliates which the signatory merchant has the power to control.

The desire of some conferences to bind all the affiliates of the contract signatory to a single contract would seem prompted primarily by two objectives: (1) To ease the solicitation or sales efforts of the conference by tying an entire corporate complex by a single contract and (2) To make it less easy for a signatory merchant to evade his obligations under the contract through the subterfuge of using an affiliated company for nonconference shipments. Neither of these interests is, in our view, sufficient to permit a clause which would bind all of the signatory merchant's affiliated companies without regard to the merchant's control over the affiliated company. In the words of the Senate Committee, "no single answer which would include or exclude all shipments made by all such related companies could suffice."[13]

[13]In speaking of the problems left to the Commission for resolution, the Senate Report said, at page 14:

"One such matter involves another 'coverage of the contract' question, somewhat like the f.o.b./f.a.s. problem. To what extent should dual rate contracts cover goods shipped by a company which is a subsidiary, affiliate or associate of the contract shipper? Obviously, no simple answer which would include or exclude all shipments made by all such related companies could suffice. The 'good faith of the contract shipper' issue is present in large proportions. If the answer were

An appropriate contract provision dealing with this question should take into account that section 14b was designed in some measure as a device for strengthening conferences by assuring them a nucleus of cargo and should recognize the problems of contract evasion which arise if only the signatory merchant is bound to the contract. We agree with the findings on this problem by the panel of Examiners in Docket No. 1111, especially since their reasoning was grounded upon an interpretation of the broad legislative intent of section 14b rather than upon any facts peculiar to an individual case.

The Examiners found that if a conference did not desire to bind a merchant's affiliates by a single contract, then it need not. However, those conferences which desire to bind affiliates should use a uniform clause which binds only those affiliated companies over which the signatory merchant regularly exercises working control in relation to shipping matters. As the Examiners pointed out, the legislative history of this provision of the statute indicates that Congress recognized that some, but not necessarily all, of a merchant's affiliates might properly be bound to a single contract. By imposing the test of regular control over shipping matters, the clause which we are approving prevents the merchant from avoiding his obligations under the contract by merely routing particular shipments in the name of an affiliated company. The further require-

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left entirely to contract shippers, it is quite conceivable that some would have subsidiaries for the express purpose of using the conference carrier only when it suited them. But if it were left entirely to the contract carrier or conference, it might well be that no matter how legitimate and autonomous the subsidiary, affiliate or associate company, the claim of 'all-or-nothing' might be made against the contract shipper."

ment in this clause that all companies over which merchant exercises this control be listed in the contract serves two additional purposes. It gives the conference a complete list of the companies entitled to contract rates, and it places a compulsion on the merchant to fully inform the conference of the names of all companies obligated under the contract. As the Examiners observed, however, no purpose under the contract would be served by requiring the merchant to also list related companies not controlled by the merchant.

It has been argued that the ease of forming subsidiaries or affiliates in some countries requires that the contract include all affiliates. If the contract binds all affiliates whose shipping matters are controlled by the signatory merchant, however, the ease of forming or extinguishing affiliates will not make such affiliates any less bound under the contract. Instances may occur where a signatory merchant breaches his contract through the use of a controlled affiliate. But no words in any agreement can assure that the parties will not breach their contract. In an attempt to make it clear that the contract requires the good faith of the parties the clause which we are approving includes a specific provision regarding various subterfuges.

The following clause will be uniformly required in all contracts with the exception that those conferences who do not desire an affiliates clause may omit the second paragraph.

> The Merchant undertakes to ship or cause to be shipped all of its ocean shipments moving in the trade on vessels of the Carriers unless otherwise provided in this agreement.

The term "Merchant" shall include the party signing this contract as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant", any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Merchant promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

The Carriers agree that they will not provide contract rates to anyone not bound by a shippers rate agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person.

Natural Routing

The fourth numbered provision of section 14b requires that all contracts include a provision which expressly:

> "(4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available:"

The mere absence of a contract provision requiring diversion from natural routings is insufficient to meet this requirement in that the statute directs that all contracts *expressly* not require diversion. As was the case with "Prompt Release," discussed above, definition of "Natural Routing" in the contract will, in the words of the "House Committee," greatly simplify the problems of shippers, who of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions."[14] We are therefore requiring that all contracts contain a uniform or standard clause on this subject as set out below.

We have included in this clause a requirement that where a merchant intends to exercise his right under this clause to use a nonconference carrier he must first notify the conference of his desire or need for service on the direct route and afford the conference an opportunity to provide such service. The approved clause also resolves what might be considered an ambiguity under this provision of the statute by requiring the merchant to use conference vessels if the conference provides service on a natural routing for the particular shipment. Thus, the con-

[14] House Report, p. 9.

tract requires shipment on conference vessels unless this constitutes *unnatural* or *indirect* routing. It has been suggested that the statute does not permit this construction. We disagree. The overall philosophy of the statute reaffirms an earlier Congressional conclusion that steamship conferences, if properly regulated, can be beneficial to our commerce and that exclusive patronage contracts under fair terms and conditions should be permitted as a means of assuring conferences a nucleus of cargo. There is no justifiable need served by relieving the merchant of his obligation to use conference vessels merely because a nonconference carrier is calling at one of the several ports through which a particular shipment could "naturally" move, and the conference calls at another port of equal natural routing but not the port served by the nonconference line. To permit the merchant to avoid his contract in these circumstances would amount to little more than obligating the merchant to use conference vessels when there was no satisfactory nonconference service available.

As we have construed the "natural routing" provision of section 14b the merchant will be free under his contract to use nonconference vessels if in fact the use of conference vessels would require him to divert his cargo to unnatural routes. The merchant will not be permitted to escape his contract obligations, however, when the nonconference service is no more natural, as it were, than that of the conference.

The following clause will be required in all contracts

> This agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by conference vessels where di-

rect carriage is available: *Provided, however,* That where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this agreement, Merchant shall first so notify the conference in accordance with the provisions of Article (prompt release) hereof.

Damages for Breach

The fifth numbered provision of section 14b requires that all contracts contain a provision which expressly:

"(5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling."

There is only one aspect of this provision which presented any serious controversy in these proceedings. All of the proposed contracts contain provisions which substantially paraphrase this provision, including its pro-

viso.[15] However, some of the proposed contracts contain provisions which would permit the carriers to suspend or terminate the merchant's right to contract rates prior to any adjudication that the merchant has breached his contract and would keep the merchant bound to exclusive patronage at the higher, noncontract rates during the pendency of arbitration or adjudication of an alleged breach. Generally, where these latter provisions have appeared, the conferences have agreed or have provided in their contracts that if the adjudication or arbitration is ultimately in the merchant's favor then the conference would refund to the merchant the difference between the contract rate and the noncontract rate which he had paid during the pendency of the litigation or arbitration.

The Senate Committee was clear in its statement that punitive suspensions or terminations by the conferences of merchants' contracts are not permitted under the statute. The Committee said:

> "Most of the dual rate contracts now used by the conferences serving U.S. ports provide for liquidated damages in the amount of dead freight, without deducting anything for cost of handling. In addition, many of them provide that if a shipper who has breached does not promptly pay the liquidated damages due, or if he breaches twice in a year, his contract shall be cancelled and he shall thereafter pay the noncontract rate. The bill would allow no such penalties." (Senate Report, p. 213.)

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[15]Some proposed contracts also provide that the cost of handling will be assumed to be a fixed percentage of the contract rate with either party having the option to challenge this cost in the particular case. Such provisions appear reasonable and therefore will be permitted.

This statement makes it plain that the limits of the merchant's punishment for violation of his contract are the damages provided by the statute and nothing more. We therefore will not permit clauses which suspend a merchant's rights but continue his obligations as an additional penalty for breach of his contract.

However, provisions which would suspend both the merchant's obligations and his rights under the contract if he does not promptly dispute or deny claims made by the conference that he has breached his contract or suspend his obligations and rights during a period that he fails to pay damages adjudged due would not appear to be contrary to the statute. Such a suspension of the merchant's contract, running only for so long as the merchant fails to pay damages adjudged due, is hardly punitive. It simply terminates the contract for that period of time during which one party refuses to fulfill his obligations. It does not impose punishment over and above damages. If the adjudged damages are promptly paid the contract is never suspended.

Some of the conferences have argued that if, under such circumstances, both the merchant's rights and obligations are suspended, unscrupulous merchants will intentionally breach their contracts by a small shipment via a nonconference vessel in order to work a cancellation of their agreements on less than the required 90 days' notice. We do not believe, however, that this poses any serious problem. Under the approved clause which is set out below, the soonest that a merchant's contract could be suspended would be 30 days following the discovery by the conference of facts which would raise a suspicion of a breach.

Presumably, some period would transpire between the merchant's shipment and the conference's discovery of that fact, and a further period of time would be consumed by the conference in informally verifying its suspicions. Thus, it is likely that it would be well in excess of 30 days following a shipment in violation of the contract before the contract could be suspended. Furthermore, for the merchant to reap any appreciable benefits from such a subterfuge his shipment would have to be relatively insignificant because if he breaches his contract he remains liable for damages without regard to whether his later failure to dispute his liability works a suspension of his contract.

We are not requiring that any contract contain an express provision giving the conference the right to suspend a merchant's rights and obligations under the contract for failure to pay adjudged damages. However, those conferences which have indicated by their proposed contracts that they desire coverage of this subject, will use the following provision which would, of course, be in addition to the mandatory provision of the statute fixing the measure of damages:

> (1) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages.
>
> (2) If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered

mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article ____, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages.

(3) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(4) Payment of damages shall automatically terminate suspension.

(5) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

To avoid later controversy regarding what might be meant in the contract by "cost of handling," we are requiring that where a liquidated damage provision is used in a contract the deduction from the contract rate shall be the "cost of loading and unloading." This is in perfect agreement with the Senate Committee's statement that "the cost of handling is understood to mean the cost of loading the cargo onto the vessel and discharging the cargo from the vessels." (Senate Report, p. 13.)

Shipper Cancellation

The next numbered provision of section 14b requires that all contracts contain a provision which expressly:

"(6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice."

All of the proposed contracts contain, as they must, clauses which conform with this provision of the statute. Therefore, no discussion is here necessary.[16]

Spread between Contract and Noncontract Rates

The next numbered provision of section 14b requires that each contract contain a provision which expressly:

> "(7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates."

Most of the proposed contracts expressly provide for the maximum 15 percent spread. A few provide for ordinary rates 15 percent higher than the contract rates which results in a spread of approximately 13 percent of the higher, ordinary rates. In none of these proceedings was there any shipper objection to the spreads as proposed by the conferences nor did any independent or nonconference carrier appear in opposition to the spreads as proposed. In these proceedings as in the Senate and House Hearings, there was, as the Senate Committee said, "general satisfaction with the 15 percent spread." (Senate Report, p. 14.)

In discussing this provision of the statute the House Committee said:

> "The provision authorizing the maximum spread between the rate charged the casual shipper and the

[16] A few of the contracts contain clauses which state, in substance, that either party may cancel the contract on 90 days' notice. In the case of termination by the conference, cancellation would, of course, have to be in accordance with the third-from-last sentence of section 14b.

exclusive patronage contract signer of 15 per cent appeared to the Committee, in the light of its experience, as reasonable. The problem was to find a figure that would not act as a penalty upon the shipper who did not choose to limit his shipments to conferences and at the same time would provide sufficient inducement to others to execute agreements. As stated, it is the belief of the Committee, which was shared by carrier and shipper witnesses alike, that the dual rate conference system provides definite advantages in assuring a nucleus of cargo to established carriers, thus enabling them to provide the equipment and service required by the majority of shippers. The contract/noncontract spread is the best practical device to assure these aims and the 15 per cent difference in rates is, in the judgment of the Committee, fair and reasonable to achieve this end without imposing a penalty or discriminating against the nonsigner." (House Report, p. 8.)

In these circumstances we find that the 15 percent spread as provided for in the majority of the proposed contracts is reasonable. It follows, of course, that the 13 percent spread of some of the proposed contracts is also reasonable. A number of the contracts also provide for the statement of rates in the highest multiple of 5 cents, or 25 cents, which does not result in a spread greater than 15 percent. This appears to be a reasonable provision and will therefore be permitted.

Cargoes Excluded from the Contract

The next numbered provision of section 14b requires that each contract contain a provision which expressly:

"(8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commisison may exclude from the contract any commodity subject to the foregoing exception."

All of the proposed contracts include provisions generally following this language. Many of the contracts as approved by the Examiners both in Docket No. 1111 and in other cases which were not consolidated for hearing in Docket No. 1111, also provide for the exclusion of liquid petroleum in less-than-full shipload lots.

We are requiring that all contracts exclude liquid bulk petroleum in less-than-full shipload lots.

As originally proposed, this provision would have excluded all bulk cargo, without exception, from the coverage of all contracts.[17] It was amended during the Senate debate to read substantially as finally enacted. The only explanation of the amendment to remove liquid bulk, except liquid chemicals, was that the provision as reported by the Senate Committee was broader than was necessary. (107 Cong. Rec. 18250.) The most detailed information and argument presented in the Senate Hearings relative to the bulk exemption were from Dow Chemical Co., who explained at some length the requirements of their particu-

[17] As reported by the Senate Committee the provision read:
"(7) excludes cargo of the contract shipper which is loaded in bulk without mark or count." (Senate Report, p. 39.)
No similar provision appeared in H.R. 6775, as it passed the House. (107 Cong. Rec. 9369-9372.)

lar business which made it necessary that bulk cargoes be excluded from contract coverage. Dow's contentions were, in part, that their chemicals should be permitted the exclusions which had in the past been generally accorded liquid petroleum. (Senate Hearings, pp. 506-509.)

It is not clear whether Congress thought the phrase "liquid chemicals" included liquid petroleum, but certainly the same factors which prompted the exclusion of liquid chemicals would serve also to exclude liquid petroleum. This conclusion is further reinforced by the obvious practical difficulties in many instances of determining with any assurance whether a particular liquid should properly be called "petroleum" and not "chemical".

Other Contract Provisions

The ninth and last numbered clause of section 14b states that dual rate contracts shall contain such other provisions "not inconsistent herewith as the Commission shall require or permit." There are a number of matters which have arisen in these proceedings which must be dealt with under this portion of section 14b.

a. *Notice of shipment via nonconference vessel.* The issue of what notice, if any, should be given by the merchant of the movement of goods via nonconference vessels was severed from a number of the individual proceedings and treated in Docket No. 1111. A variety of provisions have been suggested. Their purpose, of course, is to aid the conference in policing its contracts. The basic merchant objections to these provisions are that the statute does not require notice and that a notice requirement would impose an administrative burden upon them and

would possibly lead to interference with purchases or sales or to improper disclosure of the details of their business transactions.

In Docket No. 1111 the panel of Examiners found that a reasonable notice requirement should be permitted. We agree. Some recognition of the practical problems of enforcement of dual rate contracts would seem permissible, if not desirable. Both the Senate and House Committees acknowledged that the good faith of the signatory merchant is important to the survival of any contract system.[18] A reasonable notice provision would help assure this good faith. The provision approved by the Examiners in Docket No. 1111 appears reasonable and we will therefore permit its use in all contracts. This clause limits notice to shipments which have already moved via a non-conference vessel and thus avoids conference interference in a pending sale. Only the bare essentials of the transaction need be included in the notice and hence the burden on the merchant should be slight. The following clause will be permitted:

> Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a non-conference carrier, the Merchant shall notify the Conference in writing of this fact, giving the names of the Merchant and his customer (or vendor), the commodity involved and the quantity thereof, and the name of the non-conference carrier: *Provided, however,* That where the activities of the Merchant are so extensive in

[18] Senate Report, p. 13; House Report, p. 9.

area or the nature or volume of his sales or purchases makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

b. *Disclosure by merchant of facts relative to the routing of a particular shipment.* The issue of what rules of discovery against merchant should be permitted in the contracts was also given special treatment in Docket No. 1111. It was treated individually in other proceedings. Here again, a reasonable disclosure provision would appear to be proper in rocognition of the problems which the conference must face in policing its contracts. The basic facts concerning a merchant's shipments will in many instances be available only from the merchant's files. Merchant objection to disclosure provisions was based more on the possible abuse by the conferences of such a provision than upon disagreement with the principle of disclosure itself. The clause approved by the panel of Examiners in Docket No. 1111 strikes a fair balance between carrier and merchant interests and therefore is approved for inclusion in those contracts where the conference has expressed a desire for language covering the subject of disclosure. This clause is as follows:

> In order that the conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information

or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Merchant, and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

Many conferences objected to the portion of this provision which permits the merchant the option to require examination at the merchant's office which may be some distance from the conference office. As noted, however, the provision seeks to strike a fair balance between conference and merchant interests. It should discourage conference harassment of merchants by intemperate use of discovery but at the same time it does not impose an unreasonable burden on the conference. Moreover, we would assume that in most instances merchants will wish to furnish copies to the conference rather than to permit an outsider to look through their files in their own office.

c. *Burden of proof.* Many of the proposed contracts would place upon the merchant the burden of proving that he did not violate his contract in various circumstances. This was also one of the issues treated in Docket No. 1111. The arguments in support of placing the burden of proof upon the merchant have generally been arguments of convenience. The conferences contend that because in many instances the proof of a breach will depend upon the merchant's intent, he should have the burden of proving his intent. The language of the panel

of Examiners in Docket No. 1111 is generally appropriate here:

> "The general rule that he who claims a breach must prove the breach is so strongly entrenched in American jurisprudence that there must be some compelling reason not to follow it in the case of dual-rate contracts. Nothing has been shown to this Panel which would justify the finding that dual-rate contracts are so sacrosanct or so important as to require treatment different from that accorded most other contracts. We are not unaware, of course, that Congress, by enacting section 14b, has recognized the desirability of the dual-rate system, but it also has hedged the system with various restrictions in order to protect shippers."

As we discussed above under provision (3) of section 14b (Legal Right to Select the Carrier), we have approved a contract provision which makes the appearance of a merchant's name upon certain documents or his participation in the ocean routing of the cargo prima facie proof that he had the legal right to select the carrier. This places some burden of going forward on the merchant. More is not needed. We therefore will not approve any clause which places the burden of proof, as such, on the merchant.

d. *Merchant's right to use owned or chartered vessels.* This issue was also treated by the panel of Examiners in Docket No. 1111. Their conclusion was that contract provisions which at present permit merchants to use their owned or chartered vessels should be continued but that conferences who have not permitted such exclusions in

the past should not now be required to do so under the new law.

Exclusion from contract coverage of a merchant's goods moving on the merchant's owned or chartered vessels would primarily benefit larger shippers. However, neither the economic philosophy of the United States nor section 14b of the Shipping Act require that a merchant be deprived of all normal economies which go along with largeness. An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition. We therefore are requiring that all contracts, whether or not they previously did so, shall permit merchants to transport cargoes on their owned vessels, or on vessels chartered by the merchant provided the term of the charter is six months or more. By limiting this to charters for periods of some duration, the conferences are accorded reasonable protection from spot raiding of cargoes and merchants accorded the right to engage in bona fide proprietary carriage under reasonable conditions.

e. *Geographic scope of the contract.* Two questions have arisen in these proceedings relative to the geographic areas to be covered by the contracts. The first is the inclusion in contracts of commerce over which we have no direct jurisdiction. Some of the contracts require, for example, that the merchant promise exclusive patronage from or to ports on one of the United States coasts and contiguous ports in Canada and/or Mexico. The

argument has been made that because the Commission has no direct regulation over non-United States commerce, Canada and Mexico should not be included in the contracts presented to the Commission for approval.

The purpose of the inclusion of these areas in a single contract is to obligate merchants who desire dual rate contracts from or to the United States to also obligate themselves to exclusive patronage from or to ports contiguous to the United States. This is a natural result of the fact that the conference offers service to all such ports. If merchants were permitted to obtain lower rates by promising their exclusive patronage only from or to United States ports, they could easily use nonconference vessels from or to nearby Canadian or Mexican ports and honor the contract only when it met their convenience. We, therefore, are permitting contracts to include Canada and/or Mexico where these areas are included in the service offered by the conference.

The second question here concerns the inclusion in the contract of foreign areas not presently served by the conference vessels. This question has arisen in connection with foreign areas which are presently not being served because of political reason. Examples of such areas are Communist China and Cuba. The conferences have generally argued that they should be permitted to include these areas in their contracts in order to facilitate their resumption of service when political conditions permit. We find no harm in permitting such areas to be included. This inclusion will constitute no more than so-called standby authority to reinstitute dual rate contracts at such time as service is resumed.

One of these cases presents an additional, related problem. The proposed contract of the River Plate Brazil Conferences (Docket No. 1043) would include Great Lakes ports in addition to United States Atlantic and Gulf ports when only one conference member serves Great Lakes ports and then with only one sailing per month during that part of the year that the Lakes are open to navigation. Under these circumstances a single carrier would be permitted the benefit of the full economic force behind the conference contract with the conference, as such, offering no service to the Great Lakes. Or, as the Examiner stated in his Initial Decision:

> "The proposed contract is unjustly discriminatory because shippers must subscribe to inadequate conference service out of the Great Lakes in order to get needed contract rates from Atlantic and Gulf Ports."

We, therefore, will not permit the contract of the River Plate and Brazil Conferences to include the Great Lakes. Of course, at such time as the conference extends fuller service to the Great Lakes it may apply for permission to extend the scope of its contract system.[19]

f. *Arbitration.* Most of the proposed contracts contain clauses which require or permit arbitration of disputes arising thereunder. Some of the initial decisions have required that these clauses be qualified so as to permit

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[19]The Examiner would also withhold approval of the dual rate system as to Atlantic and Gulf ports unless the organic conference agreement were modified to eliminate the Great Lakes. It would appear that this modification of the conference agreement is better treated outside this proceeding. We are therefore not here requiring the modification of the conference agreement but rather will study the matter further with a view to possible future action.

arbitration only of those matters falling outside the jurisdiction of the Commission. This qualification is said to be necessary in order to avoid conflict with section 22 of the Shipping Act which provides "That any person may file with the Commission sworn complaint setting forth any violation of the Act . . . ." While we agree that the contract should not, nor cannot, oust the Commission from its jurisdiction and duties under the Shipping Act, limiting arbitration only to matters outside the jurisdiction of the Commission may be more restrictive than is necessary.[20] Arbitration has developed as an efficient means of settling disputes under commercial contracts generally and would appear to be an appropriate means of disposing of routine disputes which arise under dual rate contracts. We therefore have no objection to clauses which call for the arbitration of disputes provided they contain the following statement; "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction."

g. *Contract Amendments and Applicability of the Shipping Act.* Many of the proopsed contracts contain clauses which acknowledge that any amendments thereto are subject to the approval of the Commission. Some conferences argue that such provisions are unnecessary as they merely state a requirement of law. In order to avoid any misunderstanding on the part of shippers who may in many instances be unaware of the status of such agreements, we are requiring that all contracts contain a provision specifically stating that all modifications are subject to the Commission's approval. For similar rea-

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[20]See *Swift & Co. v. Federal Maritime Commission*, 306 F.2d 277 (D.C. Cir., 1962)

sons we are also requiring that the contracts include a provision acknowledging that interpretations thereof must be made in the light of the Shipping Act and the rules and regulations of the Commission.

h. *Contracts of Carriage.* Many of the proposed contracts contain provisions which state that contracts of carriage must be made with the individual conference carrier and that the other conference members have no liability under such contracts of carriage. These provisions were generally approved by the Examiners. They appear to be included merely to avoid any misunderstanding of the part of the merchant regarding the fact that the merchant must make arrangements with the individual conference members for the carriage of specific cargoes and that the conference as a whole does not assume the normal carrier liabilities of the member line under whose bill of lading the cargo moves. As such they seem proper and will be permitted.

i. *Open Rates.* The conferences have generally sought in these proceedings a means whereby they could open rates on particular commodities to meet temporary and abnormal competitive conditions without being considered to have terminated their contracts as to such commodities. Merchant's generally favored permitting conferences this flexibility. In an interpretative ruling published March 2, 1962 (27 F.R. 2046, 46 C.F.R. § 530.1) we expressed the opinion that section 14b appeared to preclude such flexibility. In retrospect, and having had the benefit of the views of all parties as well as the Examiners in these proceedings, we think that flexibility in the opening of rates, under proper safeguards, is permissible under the statute.

In Docket No. 1111 and in the other cases where the matter was at issue the Examiners generally found that there was a justifiable need on the part of the conferences for some flexibility in opening rates to meet abnormal competitive conditions. It was said that for the opening of rates to be of any benefit to the conference, it must be able to do so swiftly since one of the objectives thereof is to enable the individual conference members to move promptly in reducing rates to meet the competition. In a rapidly declining rate situation the conference machinery is often too unwieldy to keep up with the day to day fluctuations. While we do not suggest that the opening of rates is an altruistic move, it must be recognized that in many instances rates are opened in response to the demands of contract shippers. If the disparity between the conference contract rates and the rates of the carriers outside the conference becomes too great shippers will soon abandon the conference service. To keep up with the rate fluctuations in some instances requires that rate fixing initiative be returned to the individual conference members.

Under the clause which we are approving and which was approved by the examiners in Docket No. 1111, the conference will be permitted to open rates without advance notice but the individual carrier members would not be permitted to charge rates in excess of the last published conference contract rate for a period of 90 days after the rate has been opened. Also, the conference would have to give 90 days' notice of the return of the rate to the conference dual rate system. This clause was generally agreeable to the conferences, their only objection being that the

limit on rate increases should be 30, rather than 90, days.[21] The 90-day requirement is necessary however to assure that the opening of rates will not be used to accomplish a rate increase on less than the required notice. Under the approved clause, when a rate is opened the contract shippers are released from their contract with regard to the particular commodity. In these circumstances the conference carriers individually possess the initiative in meeting the rates of the carriers outside the conference and must compete individually for the open rated cargo. The approved clause further recognizes that merchants need advance notice that a rate will be returned to the conference contract system and requires 90 days' notice of this event. Tariff filings while rates are open would, of course, be subject to section 18(b).

The following clause is approved for use by those conferences who desire to provide in their contracts for the opening of rates. Our interpretative ruling of March 2, 1962, will be withdrawn.

> The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the

[21] A few conferences initially sought approval of clauses which provided for so-called open dual rates. This innovation appears to have been offered as one means of avoiding our March 2, 1962, ruling. These conferences have indicated that a clause similar to that which we are approving would also be agreeable to them. Under these circumstances it is unnecessary that we discuss the merits and vices of such clauses.

contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

j. *Conditions beyond the control of the carriers.* The proposed contracts generally contain provisions which would permit the suspension of service or rate increases on short notice where abnormal conditions beyond the control of the carriers are present. Both the words of the statute and its legislative history indicate that the carriers were to be permitted some flexibility under the contracts in extraordinary circumstances.

Provision (2) of section 14b specifically acknowledges that under some circumstances the carriers would be permitted to increase rates on less than the normal notice. As originally passed by the Senate, this provision of the section expressly provided that the limit on rate increases was not to apply in cases of "war or other force majeure." (107 Cong. Rec. 17946 et seq.) This phrase was deleted by the House-Senate conferees. (107 Cong. Rec. 19289.) Although the Conference Report did not specifically discuss this deletion, Senator Engle, one of the conferees, explained on the floor of the Senate that the

Senate conferees agreed to the deletion "because it was redundant." Senator Engle explained that "Such occurrences are always beyond the control of the contracting parties and therefore may not impose upon them obligations which they did not intend to assume when they made their contract." (107 Cong. Rec. 19782.)

In recognition of this legislative history we are permitting contract clauses which provide for exceptions to the routine of the contract system in extraordinary circumstances.

First, we are approving a contract provision which authorizes the complete suspension of the contract system under circumstances where war or other governmental action interferes with the service of the carriers. This provision merely requires that the carriers notify the merchants of the suspension of the system and give 15 days' notice of the resumption of the system. Those conferences or carriers which desire to provide for this contingency in their contracts shall use the following clause:

> In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carrier or Carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any Carrier or Carriers, said Carrier or Carriers shall forthwith reassume its or their

rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that its suspension is terminated.

Further, in order that the conference may, if it so desires, continue its contract system notwithstanding war or other governmental action which adversely affects carrier service and in recognition that the costs and risks of service increase precipitously in such circumstances, we are approving a clause which permits rate increases on 15 days' notice in such circumstances. The approved clause would also permit the continuation of the contract system at higher rates imposed in compliance with section 18(b) of the Shipping Act in other extraordinary circumstances which unduly impede or delay the carriers service Where rates are increased in either of these situations the merchant is also given the right to suspend his obligations under the contract for the duration of such increases. Those conferences or carriers which desire to provide for rate increases in such circumstances shall use the following clause:

> In the event of any of the conditions enumerated in Article * * [the clause set out above] the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the merchant, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase

or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

In the event of any extraordinary conditions not enumerated in Article * * [the clause set out above] which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The merchant may, not less than 10 days' before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

DOCKET NOS. 1109 & 1110

Some special comment is necessary regarding the contract systems of Ipar Transport, Limited (No. 1109) and D. B. Turkish Cargo Line (No. 1110) which are the only single carrier contract systems included in these proceedings.[22] The only objection to these individual carrier rate systems came from the North American Mediterranean Freight Conference which, to some extent, parallels the service of Ipar and Turkish Cargo. The Conference has also applied for permission to use a dual rate con-

[22] Ipar has given notice of cancellation of its dual rate system. However, this cancellation does not become effective until April 6, 1964, and therefore its contract is included herein.

tract. The conference argues in the main that two dual rate contracts in the same trade can only produce instability and chaos and therefore should not be permitted. The conference also challenges the lawfulness of individual carrier dual rate systems.

There would appear to be no doubt that Public Law 87-346 allows individual carriers to use dual rate contracts under the same requirements as conferences. Both in the preamble to Public Law 87-346 and throughout section 14b the separate terms "carrier" and "conference" are used. To say that a single carrier is nevertheless to be denied a dual rate system where it is in competition with a conference is to read the word "carrier" out of the statute. At least since 1914 it has been recognized that conferences (or rate-fixing combinations by some other name) are the all but universal rule in foreign water-borne commerce.[23] Thus it must be concluded that Congress in repeatedly using the word "carrier" intended to differentiate and to sanction the same treatment for an individual line as for a conference in the matter of dual rate contracts. We are therefore permitting the dual rate contract of these lines as modified to conform with our findings as to all contracts.

DOCKET NO. 1092

As mentioned above, one of these proceedings also involves the approval of a new conference aggreement

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[23]See Report on Steamship Agreements & Affiliations in the American Foreign & Domestic Trade of the House of Representatives Committee on the Merchant Marine and Fisheries, 63rd Cong., Vol. 4, p. 415 (1914). (Generally known as the "Alexander Report".)

which would combine under a single agreement several conferences in the Pacific Coast/Latin American Trade. This new agreement (Agreement No. 8660) provides for the fixing of rates and practices in the trade between Pacific Coast ports in the United States and Canada on the one hand and ports in the Caribbean, Central America, and South America (excluding ports in Brazil, Uruguay, and Argentina) on the other. The new conference would replace 10 currently existing conferences which embrace this trade area.

The primary objection to Agreement No. 8660 is that it would concentrate too much power in one conference. It should be noted, however, that the purpose of the agreement is to increase generally the efficiency of conference administration. The agreement is divided into five trade areas (three outbound from the United States and two inbound), and only those carriers who provide service in the particular trade area may vote on rates and practices which apply to that area. Thus, while the new agreement takes the place of 10 currently existing agreements, it creates what amounts to 5 new conferences under a single administrative office.

We recognize that while the new agreement may promote administrative efficiency, it also to some extent provides greater control over competion in these trades. However, this particular consolidation of several conferences serving contiguous areas does not of itself, appear to be unlawful. We perceive no undue increase in competitive strength by reason of the arrangement. We will therefore approve Agreement No. 8660. We will also observe closely the future operation under the agreement

so as to insure that the standards of section 15 of the Shipping Act are met.

The use of a dual rate contract by the new conference presents a special problem, however. As discussed above, the conference members themselves have recognized that five separate trade areas are involved and that a carrier who does not serve a particular trade should not be permitted to control the rates and practices in that trade. Yet, if the conference is permitted to offer a single dual rate contract which includes all five of the trade areas, merchants will be forced to obligate themselves to exclusive conference patronage in trade areas not desired in order to obtain contract rates in a trade area where they feel the dual rate contract meets their needs. This seems to us neither necessary nor fair.

We have approved the new agreement on the ground that it is largely concerned with providing a means of central administration for a number of conferences. In keeping with this, we are approving the use of a dual rate contract in each of these five trade areas and merchants must be offered the privilege of executing a contract for any or all of the trade areas, as they desire. We find that it would be both contrary to the public interest and detrimental to commerce for the conference to require that a merchant obligate himself to exclusive patronage in all of these trade areas in order to obtain contract rates in a single trade. Any such requirement would, of necessity, bring into serious question the new conference arrangement itself.

What we have said above in our general discussion of the express requirements of section 14b applies to the

contract form proposed by this new conference and its proposed contract will be modified accordingly.

One intervener in Docket No. 1092 argues that there is no "need" for the extension of the dual rate system to areas included in the new conference agreement which are not now covered by existing dual rate systems of the individual conferences. Section 14b does not require that the conference demonstrate a positive need for the system as a prerequisite for approval. Rather it authorizes the use of dual rate contracts if they meet certain safeguards. Moreover, it appears that the requirements which we have here generally imposed on all contracts satisfy most of this interveners objections.

One other matter regarding the contract system of the new conference requires some discussion. The tariffs of the conferences who are combining under the new agreement split their total charges for ocean freight into two parts. One is a so-called freight rate which is in payment for service from ship's tackle at port of origin to ship's tackle at the destination port. The other is a so-called handling charge which is in payment for movement of the cargo from ship's tackle to place of rest on the dock. The conferences acknowledge that "the handling charge is a component part of the overall freight paid for transportation." While there would appear to be nothing in section 14b which would require that two levels of "handling charges" be stated by conferences using dual rate systems, it would make folly of the section to permit conferences to avoid the rate stability or guarantee which the section assures contract shippers through the simple device of segregating into separate elements the prices charged for

the total carrier services. While we will not require the conferences to state two levels of "handling charges" in their tariffs, they should be aware that they will not be permitted to increase their handling charges on less than the 90 days' notice required of carriers using dual rate systems.

We recognize that it may take some time to accomplish the details involved in the dissolution of the ten separate conferences and in formally organizing the new conference and that the dual rate contracts of the eight of the ten conferences which currently use contracts expire by the terms of section 3 of Public Law 87-346 on April 4, 1964. The individual conferences will therefore be allowed to use the dual rate contract proposed by the new conference, as modified herein, until such time as the new conference can be formally organized.

CONCLUSION

The contracts submitted in these proceedings, modified as set out in the orders attached hereto, are found to comply with the requirements of section 14b of the Shipping Act, 1916. Provisions which have been found herein to be permissible, but not mandatory, may be added or deleted from the contracts as set out in the attached orders before said contracts are tendered to merchants for signing.

The concurring and dissenting opinion of Commissioner Patterson is attached with serially numbered pages followed by the initials JSP.

March 27, 1964

/s/ Thomas Lisi
Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION
WASHINGTON 25, D. C.

March 30, 1964

THE DUAL RATE CASES

Re: Concurring and dissenting opinion of Commissioner Patterson

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Transmitted herewith is Commissioner John S. Patterson's report dated March 30, 1964, concurring with, and dissenting to, the Federal Maritime Commission majority's report in *"The Dual Rate Cases"* dated March 27, 1964, in accordance with the *"Note"* appended to the end of the majority's report.

Commissioner Patterson's report should be attached to the majority's report.

/s/ Thomas Lisi
Thomas Lisi
Secretary

Commissioner Patterson, concurring and dissenting:

The following report covers what would be my response to applications filed pursuant to Sec. 14b of the Shipping Act, 1916 (Act), by 57 conferences of carriers and one carrier in the foreign commerce of the United States for permission to use 24 types of contract forms to be tendered merchant shippers. The proposed contract forms provide lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage to such conferences or carriers and generally contain provisions which the applicants claim conform to the description of such contracts in Sec. 14b. The contracts are referred to generally hereafter as the "contracts".

Each application and its annexed contract forms has been made the subject of a docketed proceeding to determine whether the Commission should permit the use of these standard form contracts so drafted to make them available to all shippers and consignees on equal terms and conditions. We are required to give permission to use "unless the Commission finds that the contract, amendment or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors" and if the contract, amendment or modification "expressly" contains eight specific types of obligations. In performing this function we have been authorized by Sec. 14b(9) to approve a contract containing "such other provisions not inconsistent herewith as the Commission shall require or permit"; and by Sec. 3 of P. L. 87-346 to "approve, disapprove, cancel or modify all such agrements and amendments in accordance with the provisions of this Act" (P.L. 87-346).

The purpose of these proceedings is to comply with this mandate and with the Congressional directive to the Commission in Sec. 3 that it shall approve, disapprove, cancel or modify contracts within the period ending April 3, 1964.

Acting pursuant to these mandates the majority of the members of the Commission have required that each of the applicants' contracts must be modified to achieve conformity with Sec. 14b by the use of certain required provisions and no others and has in effect declared invalid the applicants' provisions on the same subjects.

The majority's newly prescribed and required provisions are not found in any application for permission to use a contract submitted by respondents, nor have they been proposed by the examiners and accepted by respondents, but have been conceived and adopted by the majority for compulsory use. None of the required provisions has been subjected to review, hearing, or comment. By this process the initiative for submitting a contract which we will permit to be used is taken away from the applicants and is assumed by the majority even though there is no finding that the provisions they are to replace have any of the prohibited effects referred to in the first sentence of Sec. 14b which were quoted above.

The Congressional intent of Sec. 14b, as I see it, is to place the initiative for preparing a contract on the applicant carriers or their conferences acting according to their own commercial needs, and to place the burden of not permitting (i.e., forbidding) the use of a contract on us after we show the prohibited effects exist in any case, or nonconformity with any of the eight conditions in Sec. 14b.

It is from this base that I embarked on the task of reviewing and considering whether or not to permit the use of contracts.

Dissent is based on the failure of the majority (1) to conform to the requirements of Sec. 14b, and of Sec. 3 of P.L. 87-346, (a) by denying notice and hearing on future nonconforming proposals and (b) by failing to meet the burden of showing how applicants do not conform before refusing to permit use of contracts; (2) to

conform to the requirements of Sec. 4 of the Administrative Procedure Act, and (3) to follow Congressional policy in its treatment of proposed contracts.

(1)(a) The ignored statutory compulsions of Sec. 14b are that carrier-applied-for contracts should not be prejudged but should be permitted after notice and hearing (i.e., adjudication) unless the Commission finds a particular contract will be detrimental to commerce or contrary to the other standards listed, or fails to cover expressly the enumerated subjects. If we say that each future contract, no matter what it contains, is not to be permitted without the prescribed clauses, we are making our order, not after notice and hearing on each contract, but before a hearing thereon. Notice and hearing with respect to future proposals has been denied because of the presently announced rule that only the required clauses will be permitted hereafter. Sec. 14b is being disregarded when the right of notice and hearing is foreclosed.

(1) (b) The requirements of Sec. 14b in a proceeding to permit the use of a contract or to forbid the use of a contract is to review each applicant's contract on its own merits, one by one. The purpose of these proceedings is not to prescribe the use of the Commission's contract by any particular applicant, nor is it to perfect or rewrite contracts, but only to measure each applicant's contract by statutory tests and to forbid use after an adjudication if the measure is not met. If the contract fails, the Commission's order may require other provisions as authorized in (9) of Sec. 14b or the Commission may modify by its order in accordance with Sec. 3 of P.L.

87-346. Before modifying or requiring something else, however, the Commission must show how the applicant's contract has failed to meet the measure. The Commission has a statutory obligation or "burden" to do at least this much. The use of item (9), providing that a contract may contain such other conditions as the Commission may require or permit, or of Sec. 3, directing the Commission within a year to approve, disapprove or modify agreements, is simply a useful way of expediting an order giving permission to use a contract instead of just forbidding various provisions and wasting time with repeated re-applications until a permissible contract is achieved.

The majority justifies as consistent with the law or as reasonable the contract provisions it has required as substitutes for those applied for in contracts. It does not follow that because a government-required reasonable provision is consistent with the law, all other provisions are automatically contrary to the requirements of Sec. 14b. The burden to show failure of other provisions to conform rests on the Commission *before* it may exercise its own judgment. The majority has overlooked this essential procedural step.

(2) Sec. 4 of the Administrative Procedure Act provides that general notice of proposed rules shall be published and interested persons shall be afforded the opportunity to participate in the formulation of rules through the submission of views or comments before rules are adopted. The majority, by prescribing for the first time in its report the only contract provisions that must be embodied in all future contracts before it will permit

the use of a contract, has thereby made a statement of general applicability and future effect. The presently prescribed provisions are for the guidance of the public if any applicant wants to get permission to use a contract.

The panel of five examiners in Docket No. 1111 understood what they were doing in this respect when they prescribed similar provisions: ". . . the present proceeding . . . is rulemaking in nature" although adjudicatory in form, they said (p. 62). In spite of their understanding, they refused to alter their procedure, however. The Commission makes no comparable acknowledgment, but its deeds are consistent with such an understanding that it is making rules.

There has been no general notice published that the prescribed provisions were being considered and that interested persons were being given an opportunity to participate in their formulation through the submission of views. The only effort in this direction was in Docket No. 983, giving notice on March 21, 1963, of a rulemaking proceeding to consider adoption of rules governing contract rate systems and including a standard form of dual-rate exclusive patronage contract. Comments were due on May 25, 1963. These rules are still awaiting adoption, and they are not part of this proceeding. The deficiency in notice is not supplied by the "Orders of Investigation and Hearing" in the dockets herein, because the only purpose of such orders was to initiate an adjudication of whether the particular contract met the requirements of Sec. 14b, and no proposed rule was ever published in any of these notices. The decision to require prescribed provisions was made later, but with no change in the

orders of investigation, nor publication of any notice of proposed rulemaking.

Except for interrogation in oral argument, applicants have had no indication, much less has the rest of the public had notice, that the prescribed provisions would be required. Neither have other interested persons not respondents or intervenors herein had any opportunity to participate in the formulation of these particular rule-made provisions.

It is not considered that the provisions of Sec. 14b(9) or Sec. 3 of P.L. 87-346, authorizing requirements and modifications in contracts, supersede the mandate of Sec. 4 of the Administrative Procedure Act in regard to a need for notice of proposed rulemaking as to the newly prescribed provisions having general applicability and future effect. Item (9) is to authorize changes having particular applicability and present effect on specific contracts being considered for a grant of permission to use them.

There is no doubt that Congress intended that we should establish standards for dual-rate contracts and that we would be expected to provide a standard form of contract which all conferences might utilize, as the majority says. I am confident that it was equally expected that we would observe existing laws governing procedures to be followed in achieving the intended results. The assertion of an expectation by a Congressional Committee does not justify abandonment of existing prescriptions of law. Congressional expectations are not enough to repeal Sec. 4 of the Administrative Procedure Act in regard to these

contracts. The Committee's expectation was to be accomplished in our rulemaking Docket No. 983, which is still awaiting action by the Commission.

The desirability of uniform results is assigned as a reason for compulsory rule-made provisions. Desirability, however, is no substitute for statutory compulsion. The majority has committed a fatal error in not complying with the Administrative Procedure Act.

(3) Lastly, there is a fundamental policy error in the majority's base of approach. Its base point assumption is that there is something absolute, final, or superior about what the Government prescribes when it administers a law, at least until the Government decides to make a change. This should not be so. The commercial trading context in which these contracts are used cannot function with such rigidity when there is any new development such as Sec. 14b. In the commercial world, the ability to change obligations in response to experienced needs after mutual consent within the guides put up by Sec. 14b is an essential factor of existence. Congress has carefully avoided imposing an inflexible revision of historically developed trading conditions, but has only altered some of the conditions. Why should we do what Congress has avoided? A period of adjustment, within the guidelines of Sec. 14b, will be required in traditional contracting practices in world-wide trades. Our job is to review and pass on the diverse forms of adjustment. This adjustment should be allowed if possible, and should not be immediately shut off and solidified into new rule-imposed rigidities emanating from a Government agency at only one end of the trading route, no matter how high-minded

and superior the adjustments may seem to us at the moment.

As a part of our program to review applications for permission to use contracts pursuant to Sec. 14b, it was decided that there were five issues common to all application proceedings; consequently, their severance from existing application proceedings was ordered. The issues were stated in the order initiating Docket No. 1111 as follows:

"Definition of Contract Shipper

(a) Whether the Commission should approve, disapprove or require modification of contract provisions requiring inclusion in the contract of affiliates of the contract shipper or of other connected companies.

"Contract Shipper Commitment

(b) To what degree, if any, may or should contracts exclude a portion of shipments, commodities, or shipments on owned or chartered vessels?

"Legal Right to Select the Carrier

(c) Whether the provision required by section 14b (3) in all contracts, to limit the coverage of the contracts to 'those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier' requires special language in the contracts in order to avoid uncertainty and potential disputes as to the obligations of the merchant, or whether the language of section 14b (3) should be incorporated, verbatim, in the contracts.

"Notice, Disclosure and Burden of Proof

(d) Whether the Commission should approve, disapprove or require modification of contract provisions imposing notice and disclosure requirements upon the contract shipper in the event of non-conference shipments or of suspected or alleged breach of contract, and provisions relating to the burden of proof as to whether he has violated the contract.

"Termination for Breach

(e) Whether the contracts should permit carriers or conferences to terminate individual contracts for breach or alleged breach of contract by the merchant".

A separate proceeding was docketed to consider the above issues, and a panel of five examiners has served an initial decision giving its answers to the five questions.

The issues described in (a) and (c) are discussed together in the majority's report under the heading "Legal Right to Select the Carrier." For convenience the discussion herein is re-separated into two parts called the "legal rights" issue and the "affiliates" issue. Dissent is to the majority's conclusions on both these issues.

1. The "legal rights" issue.

After the contract shipper has been determined, Sec. 14b (3) requires that the contract cover only those goods of such shipper "as to the shipment of which he has the legal right at the time of shipment to select the carrier." The legal right to select defines the goods subject to the contract obligation. The right to select must be determined later at the time of shipment by external evidence

in a specific transaction. The external evidence relates to arrangements the contract shipper, or merchant as he is called in many of the contracts, makes later on with the persons to whom the goods are sold or with the persons financing the sale of the goods subject to shipment.

The majority has resolved the problems connected with the necessities of such later determination on evidence, by the apparently simple expedient of drafting a 5-paragraph section of which 4 paragraphs "will be required in all contracts" and a fifth containing two sub-paragraphs that "may be used by those conferences which desire a provision which raises a presumption where the signatory merchant is named in the bill of lading or export declaration or participates in the ocean routing."

After reading these prescribed paragraphs the parties to a contract will still have the practical problem of locating the legal right to select the carrier. The majority has prescribed four paragraphs using the statutory terms "legal right", the very terms needing definition, and then has made optional the use of the fifth paragraph defining how the legal right might be determined. At the moment of providing a useful guide, it backs away from the last step with only an optional provision.

The reasons for a dissent from all compulsory requirements have already been stated, but I further dissent from the decision to permit the optional paragraph only and no other as a solution to this problem. In reality, a very restricted choice is given by the option because variations of the option are not permitted. Many applicants submitted what should be permissible variations.

The optional paragraphs resolved the evidence problem by providing "the Merchant shall be deemed prima facie to have the legal right . . ." if he "arranged" the ocean shipment or if his name appears on the bill of lading or export declaration as shipper. There is no objection to the use of his name on the bill of lading or export declaration as evidence, nor in participation in arrangements. There is objection to the "prima facie" test which restricts the parties to an illusory and unworkable guide.

What is "prima facie" is at best indefinite, but some lack of clarity in the mandated paragraph is dispelled by the majority's disclosure of what it has in mind when it uses the term: "We are therefore approving a contract provision which will raise a rebuttable presumption, as it were, that the merchant possessed the legal right at the time of shipment to select the ocean carrier . . . Those who desire some provision relating to presumptions may use it . . ." A "rebuttable presumption" is the true basis of the optional provision, and is a true revelation of what is meant by "prima facie". Applicants who do not desire such a provision relating to presumption, but desire instead some other objective way of fixing the evidence, have no other choice. Many such provisions were applied for. The choice has been denied them with no finding that other alternatives have any of the effects prohibited by the first sentence of Sec. 14b. All the majority does is announce its results without providing any consecutively thought out linkage to the statute.

It is entirely consistent with Sec. 14b(3), on the contrary, to find that there is a compelling public interest

and advantage to commerce in letting the bill of lading point to the true selector of the carrier, by means of contract provisions which deem the merchant to have the legal right to select if his name appears on the carrier's bill of lading as shipper.

The statute makes it necessary to determine the fact of who has the legal right to select the carrier. This simply means that there must be a finding of fact based on evidence, not that anyone has to establish final truth. The latter is rarely known. The evidence need only show what, as a practical matter, can be determined as to the identity of the shipper in any particular shipment. As a practical matter, taking the evidence of what carrier's bill of lading form has been chosen, what the merchant himself intends and has written on the bill of lading, and what is accepted by the master of the ship as shown by his signature simply provides a clear, definite standard by which to measure performance. What is more, the proposed provision is known ahead of time and will guide the parties' action so that their business conduct may be based on a known test. Both merchant and carrier know ahead of time that if a person is called a shipper on the bill of lading then he will be one under the contract. The need for presuming later can be avoided. The test is consistent with reality.

Implicit, but not stated in the prescribed provision, if used, is an assumption that it is wrong to deem the shipper on the bill of lading to be the shipper under the contract if this is a conclusive presumption. So the majority has set about reversing this presumption and substituting

a rebuttable one, with the words "deemed prima facie". It is assumed that the right to select the carrier is an abstraction which somehow becomes reality and truth after presumption and rebuttal. This seems to assume further that you can take the "legal right" to make a choice, or to select, and consider the act of choosing apart from other manifestations of power and conduct in the business world by rebutting and counter-rebutting your way to the truth. Many conference provisions examined avoid this by making conduct the guide.

The many respondents in these proceedings who made conduct the guide did so by applying for permission to use contracts which make it a breach of contract if the merchant ships on non-contract ships and his name shows up on a bill of lading as the shipper. These contract provisions are frozen out without any finding that they are detrimental to the commerce or contrary to any other prohibition of Sec. 14b.

All the applicants have done is to say that if merchants have used their power and then have done certain things in a business transaction dealing with the sale of goods, and if as a result someone's name gets shown as a shipper on the bill of lading, then these actions constitute substantial evidence in that particular transaction that the person named really is the shipper who selected the carrier. When it is provided that the name typed in on a bill of lading form opposite the word "shipper" (which has been on all bill of lading forms I have seen) shall also mean that person had the legal right, it means the evidence is so substantial that it will overcome any other evidence as to who is the shipper with a legal right to select a carrier.

The advantage to commerce in such provisions is first that they recognize that the basic problem is one of proof where nothing is said ahead of time about the right to select the carrier and they fill in the gap, and, second, that they will bring added certainty to an area of past misunderstanding between carriers and merchants.

To understand how the gap in proof is supplied and how it can provide advance warning to merchants, we may start with the premise that the term "shipper" means the person who ships, who sends goods on their journey by having them placed on board a ship. My understanding is shared by the witness who testified in Docket No. 1111 as to financing as follows:

> "Q * * * You have referred a number of times to shipper testimony and I am wondering if you can tell us what you mean when you say shipper?
>
> "A When I refer to a shipper I was referring to a cotton merchant, merchandiser of cotton who is in the exporting business and he would be the shipper.
>
> "Q Is it correct to say you mean the exporter as opposed to the foreign consignee?
>
> "A Definitely. A shipper will be the merchant himself.
>
> "Q Is that your understanding that that is the usual usage of the term in the trade?
>
> "A I would say yes, the shipper would be the man that exports the cotton and presumably would be the man who sold the cotton."

(Transcript, p. 2467, line 25, and p. 2468, lines 1-13). The understandings reflected above derive support from the ordinary dictionary definition which ought to do here as confirmation of our respective understanding: "one who

ships goods; broadly, one who sends goods by any form of conveyance."

In ocean transportation such person, customarily and absent a special agreement, selects the conveyance, in this case a ship, by making arrangements commonly called "booking" with the carrier which provides the required ocean transportation.

If a blank line for the insertion of a name on a bill of lading after the word "shipper" is filled in by the insertion of a person or company's name, absent any other qualification, and taking such writing at face value, one would conclude that the person who made out the form and called himself a shipper was the one who selected the conveying carrier. As one of the attorneys being examined in Docket No. 1111 said, "The appearance of his name as shipper on the bill of lading necessarily means that he is asserting and exercising control over the movement of those goods . . . if it's an authorized assertion of control over the goods he has the right to select the carrier and has exercised it by booking the cargo . . ." (Vol. 3, Transcript, p. 30). Such a person usually arranges or participates in the arrangements for the ocean shipment, in other words.

Before a merchant prepares a bill of lading, he must decide which carrier's bill of lading form is to be used. After he decides he must give instructions that a bill of lading form with the selected carrier's name printed at the top be used and that the "leading marks necessary for identification of the goods" or other identifying symbols on the packages containing the property he has sold be written on the face of the form along with his name

opposite the word shipper, to the extent required by the Carriage of Goods by Sea Act.[1] By this conduct, and by this exercise of power, the merchant makes a choice whether he does so as agent or principal. When the merchant instructs that his name be used as shipper in the carrier's bill of lading and his property be described therein, he has at that moment participated in the arrangement for ocean shipment and has asserted a right to choose a carrier. It is to avoid the consequences of this choice that contract shippers who have divested themselves of the right to select try to subtract from the implications of the proof supplied by the shipper designation of a bill of lading, so that it will no longer supply proof that they exercised any right to select. To justify the subtraction, it is pointed out that many other business

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[1]Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208, 46 U.S.C. § 1303. Sec. (3) provides:

"(1) • • •

"(2) • • •

Contents of bill

"(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

• • •"

The law does not require the shipper to "furnish in writing" the name of the vessel, dates, ports or the shipper's or consignor's or the consignee's names and addresses, but by custom this information is written in at the same time as the cargo information is furnished.

practices depend upon the presence of the merchant's name as shipper in the bill of lading, even though he may no longer exercise the right to select.

The normal or prima facie conclusion about what the shipper designation proves may be distorted by these other business practices. Such practices as having a special agreement covering the conditions of sale, pricing, and financing security arrangements influence the location of the power to select the carrier. The power to select may be removed from the person whose name appears on the goods as shipper. Nevertheless, the customary practice in banking is "that the beneficiary should appear as shipper" in a bill of lading (Docket No. 1111, Exhibit 41, and Transcript, page 2462, Testimony of Richards, and pages 2463, lines 5-10, 2466, lines 1-15, and 2478, lines 7-13). The beneficiary is the person who gets the money for the sale price. In banking transactions, the letter of credit may control the choice of the carrier, but what goes in the bill of lading may be less adjustable because of the requirements of the Carriage of Goods by Sea Act. The terms of the letter of credit, however, are subject to negotiation on these subjects. (Transcript, pages 2478, lines 14-25, 2479, lines 1-18, and 2481, lines 17-24). Government programs are also influential. The Government's Commodity Credit Corporation requirements, for another example, create distortions by making the exporter "produce an on-board bill of lading in his name in order to receive the payment-in-kind certificates or to satisfy the bonded obligation to export the cotton under the cotton export sales program." A witness also stated, "It is a matter of virtual necessity therefore that the U. S. shipper's name

appear on an on-board bill of lading regardless of whether he has any control, or right to control, the shipment." (Docket No. 1111, Exhibit 45, pp. 2 and 3, Statement of Eric A. Catmur, American Cotton Shippers Association. Supporting references were also made to U. S. Department of Agriculture, Commodity Credit Corporation Announcement CN-EX-18, Section II-D-3, paragraph 6, signed by Raymond A. Ioues, Administrator, FAS, and to: "United States Department of Agriculture, Agricultural Stabilization and Conservation Service Payment-in-Kind Regulations, Article 7, Chapter XIV, Commodity Credit Corporation, Subchapter C—Export Programs, Part 1482—Cotton, Sec. 1482.610, par. (c), signed and dated June 19, 1963, by H. D. Godfrey, Exec. Vice Pres., CCC). This testimony and these regulations prove, if anything, that either the reported practices have nothing to do with carrier selection, or, to the extent they do have an influence, they require distortion of traditional understandings based on the usual attributes of power in the shipper status. Section 14b recognizes this aspect of power when it refers to a contract shipper who "permits himself to be divested of the legal right to select the carrier". Implicit here is recognition of a need to divest the usual power to choose. If the divesting occurs the evidence should show that when the fact of choice changes, the appearance of choice should also change, rather than remain deceptively the same simply to accommodate to the lack of adaptability of letters of credit and government regulations.

In effect, there is a commercially accepted practice, at least where a beneficiary or exporter does not select the

carrier, of distorting the proof about the usual powers of the shipper named in the bill of lading. This may be done to carry out the terms of a letter of credit or to accommodate government regulations, but it is at variance with the normally understood facts as the bill of lading terms show them.

The foregoing considerations to the contrary, there are good reasons why a common understanding of the term "shipper" should not be distorted by allowing a contract shipper, who divests himself of the right to select, to remain a shipper on a bill of lading.

When we deal with the information on the face of a bill of lading, we are not dealing with legal subtleties, but with general understandings of people in shipping departments of exporters who make out the documents, of people on the docks who read the bill of lading. The shipper is not helpless and has full control over this information under the Carriage of Goods by Sea Act as well as by his own conduct. If he has changed his rights or status, he is the one to know about it and tell the carrier. He can do this since, by law, the shipper or exporter must prepare the bill of lading, and should underwrite the accuracy of the information. Accordingly, it is important that the Commission impose on shippers a high degree of care and establish commonly accepted understandings to serve as proofs useful in administering contracts affecting the commerce of the United States.

If the bill of lading is to be a reliable shipping document I see no reason why the Commission should allow the plain meaning of the bill of lading to be distorted simply to facilitate financing or to accommodate govern-

mental regulations, particularly where an element of deception may occur. On the contrary, the integrity of the bill of lading should be preserved, and other commercial practices should be adapted by revisions in letters of credit or in regulations. The bill of lading, if it is an accurate shipping document, should provide valid proof for the purpose of determining whether or not there has been performance of the merchant's contract. These two documents, as well as what is marked on the cargo packages, should be all consistent with each other. This can be accomplished by exporting merchants keeping their names off the bill of lading when they are not carrier-selecting shippers. If merchants are not accurate about their shipper status in the bill of lading, then they must either take the consequences of the factual representations for the purpose of performing the merchant's contract or prove beyond a doubt that a mistake was made.

One witness said difficulty arises "when another carrier is specified by the buyer and a conference attempts to apply a rule at variance with the terms of sale, which gives the buyer control of the carrier". The difficulty vanishes, however, if the merchant-seller does not agree to assume obligations at variance with the terms of his exclusive patronage contract. It is not the conference's attempt to apply a rule at variance with the terms of sale that creates the difficulty, but the seller's choosing terms of sale wherein he acts as buyer's agent in selecting the carrier contrary to his obligation as a merchant and the seller's activity in preparing the bill of lading. The buyer, consistently with Section 14b, may reserve the right to select the carrier and the merchant may relinquish the

right, but the buyer must do so independently and may not involve the merchant in the selection, and the merchant must stay out of the activity surrounding the choice of the carrier. There is no interference here with sales contracts, but only a requirement that the merchant make his actions and his papers consistent with his choice not to assume the shipper's right to select the carrier. If a merchant wants to retain control of the goods as against the buyer for security purposes, then he may not give up to the buyer one of the chief attributes of ownership, the power to control the choice of a carrier, and may not disguise the relinquishment by continuing to call himself a shipper to avoid obligations under the merchant's contract.

The majority refers to the "House Committee Report" and also requires that nothing in a contract "shall require the merchant to forego a sale unless the shipment is made by a conference vessel." Reference is made to page 9 of the House Report on Section 14b before enactment. What the Report said was that its provision "prohibits a conference or carrier from requiring a contract signatory to forego a sale unless shipment is made via conference vessels." The contracts reviewed do not require foregoing a sale, so the prohibition is satisfied. Merchants are still free to make any type of sale they want. All they have to do is prepare a precise bill of lading and stay out of the arrangements for ocean shipment.

Provisions along the lines discussed are also consistent with past decisions of this agency and conform to the Congressional intent of Section 14b.

The proposed shipper test is consistent with at least two decisions of the Commission or its predecessors wherein resort was had to the bill of lading to prove who was the shipper. The former Board said: "We deem it highly desirable that simple tests and standards be applicable [in determining when a given shipment is or is not covered by the shipper's agreement]. To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper." *In The Matter of The Statement of Japan-Atlantic & Gulf Freight Conference Filed Under General Order 76* (1955), 4 F.M.B. 706, 740, reversed *Isbrandtsen Company v. United States* (U.S. App. D.C. 1956) 239 F.2d 933, aff'd 356 U.S. 48. (The above statement was not involved in the reversal.) The Board also had the following to say: "Respondents claim that Isbrandtsen is not a shipper and therefore can not claim that he has been discriminated against as a shipper. Isbrandtsen's name appears as a shipper on the bills of lading in evidence . . ." *Isbrandtsen Co., Inc. et al. v. States Marine et al.*, 6 FMC 422 at 447 (1961), aff'd 313 F. 2d 906, *certiorari denied.* 374 U.S. 831 (1963).

The proposed solution, consistent with these past decisions, contributes a practical solution of the difficult problem of deciding, among opposing positions, who selects the carrier in any given case. Reconciliation of competing claims was described as follows in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, which later became Section 14b:

> "Some shippers complained that a few conferences were extreme in their demands on contract shipments requiring shippers to use conference vessels even if

the shipper had no legal right to choose the carrier. On the other hand, steamship companies also complained that unscrupulous shippers would use conference vessels at the contract rates when it suited them or ship by nonconference lines without loss of contract rights merely by changing the terms of sale. It was extremely difficult to reconcile the two opposing requirements of this basic feature of the shipping contract." 87th Cong., 1st Sess., Report No. 498, p. 9; *Index to Legislative History of the Steamship Conference/Dual Rate Law,* p. 120, 87th Cong., 2nd Sess., Senate Doc. No. 100.

These comments reflect a long-standing controversy over whether certain shipments, notably those consisting of goods sold on freight-on-board or freight-at-side of ship terms, were covered by exclusive patronage contracts. It was hoped the proposed language of Section 14b (3) would help resolve these disputes. Still the problem of proof of the right to select the carrier remained. The bill-of-lading shipper test appeared to offer a way out on the ground that the bill of lading correctly points to the true shipper who selects the carrier.

A frequent argument we heard was that the record amply demonstrates that the question of who has the legal right to select has nothing to do with whose name appears on the bill of lading or who arranges the shipment. This is undoubtedly true, but it does not preclude action by us which makes the act of selection have something to do with whose name gets on the bill of lading. Another point to make is that the merchant does have something to do with the selection and his name is there because of his activities, and because he wants benefits inconsistent with

such activities. The merchant does have a choice as to whether he will act as agent for someone who is not a party to the contract. If the agency requires the merchant to deliver goods to a nonconference vessel and the securing of a bill of lading naming the merchant as "shipper" the agency is inconsistent with the contractual obligations to the conference and should not be accepted by him.

It was hoped that the Commission would provide some help in reconciling the two opposing requirements referred to by the Committee, but it is feared the majority has left us just as far from a solution as ever, because its "prima facie" provision actually will be productive of delays, arguments, and controversies. The provision is too indefinite for practical purposes.

Ideally, a contract should be drafted so that the actions constituting performance can be tested by objective standards. It should be written in terms of future acts. It should require people to do specific things at certain times and in a prescribed manner. A contract which is not specific and certain as to the actions required may fail for want of definiteness or impossibility of ascertainment of the required performance. Making legal rules of evidence, such as "prima facie" and legal conclusions such as "legal right", the subject of a contract obligation does not meet the conditions of objectivity and definiteness. They only postpone ascertainment of the facts which should be speedily ascertainable in the commercial world. A contract which makes the ascertainment of performance depend on a presumption subject to rebuttal or on a legal right simply converts the test of performance into claims

and counter-claims. A right of rebuttal invites denial that one had a "legal right", itself an intangible concept, and leads to further rebuttal as to the contrary of the contrary, etc. The proofs of carrier selection will have to consist of a miscellany of cables, shipping papers, half-remembered telephone conversations, oral testimony, correspondence, both available and unavailable, and a host of who-struck-John arguments by merchants about who was to select the carrier and when and how he was to do it. I would reject this program of shifting rebuttals in favor of a practical objective standard.

The substitute language, by giving the appearance of proof when it refers to the shipper test, and by taking the test away with the rebuttal right, leaves us just where we were before Congress acted—in the middle of an argument over the merchant's shifting status. We are, furthermore, right back where we started with no practical, objective means of precluding what hearing counsel described as "the even more odius practice of having the merchant make a nonconference shipment for the nonsignatory and claim it was not his shipment even though he is named as 'shipper' because by the terms of sale, he did not have the 'legal right' to select the carrier." The prima facie provision gives such a "claim" a dignity it would not otherwise have.

The need for an objective standard is so compelling that the bill-of-lading shipper test might well be applied as a conclusive test.

For these reasons, I think the proposed requirement is contrary to the public interest and detrimental to the commerce of the United States.

2. The "affiliates" issue.

In an effort to define the persons to be obligated as "all shippers and consignees" (the terms used in the first sentence of Sec. 14b) and to become "the contract shipper" (under item (3) of Sec. 14b), some contracts proposed to cover "the Merchant, its agents and its subsidiary, associated or parent companies." This was called for convenience the "all affiliates" clause. Other contracts proposed to cover only the shipper named at the end of the contract above the space for the signature (the contract referred to, it is to be noted, also contained an unclear, undefined reference to evasion by subsidiaries). Between these extremes were various provisions attempting to define the extent of corporate control which would cause the contract's obligations to apply to a merchant. Each should be potentially permissible, without prejudgment. In the inbound trading contracts, the provision should take into consideration the laws and customs of the foreign areas where the signatory merchants would be located. In the outbound trading contracts, the provision should accommodate itself to contemporary corporate organization and control in this country and of each signatory's peculiar situation. The majority does not permit such flexibility.

There is no difficulty in saying that the all-affiliate clause in contracts with United States merchants is contrary to the public interest because (1) it is uncertain as to its applicability and therefore productive of disputes, delaying expeditious closing of transactions; (2) it is oppressive in its operation by binding companies having little commercial identity of interest with the

signatory company; and (3) it will not accomplish its professed objective of preventing fraud and evasion by merchants. If anything, the broad clause will invite fraud by its extreme demands. Evasion, like bad morality, is not stopped by private contract any more than by laws. Short of an "all affiliates" clause, any affiliate provision should be permitted which confines the corporate affiliates to be bound to those over which the signatory merchant exercises effective working control over management decisions affecting ocean transportation (to be ascertained by tests to be negotiated), or such companies (decided upon through negotiation before the contract is signed) as are named in the contract at the end under the signatures or elsewhere. The latter will assure certainty as to the meeting of the minds of the parties as to just what entities are to be obligated. Under either guide, there is no impediment to the conference seeking a separate contract with those affiliates which the merchant excludes from the listing on his contract. These standards have been applied in the review of the contracts further on in this report.

The issues described in (b) of the order initiating Docket No. 1111 are discussed in the majority's report under the heading "Merchant's right to use owned or chartered vessels." I concur with the majority's conclusion that contracts should allow carriage on owned or chartered vessels of merchants and that there should be a six months or more charter requirement.

The issues described in (d) of the order initiating Docket No. 1111 are discussed in the majority's report under the two headings "Disclosure by merchant of facts

relative to the routing of a particular shipment" and "Burden of proof." I concur generally with the majority's conclusion that we should not permit use of any provision which requires the merchant to sustain the burden of proof of innocence of carrier claims of breach of contract. The merchant may be required to make relevant papers, such as bills of lading, available and to disprove established evidence of breach of contract, but no more. What should be permitted or forbidden in any case should depend on the applicant's contract proposals.

The issues described in (e) of the order initiating Docket No. 1111 are discussed in the majority's report under the heading "Damages for Breach." Authority to "not permit clauses which suspend a merchant's rights but continue his obligations as an additional penalty for breach of his contract" is asserted, based on derivation from a statement in a Senate Committee report. Such a statement is not law and, insofar as the portion quoted by the majority says the bill that became Sec. 14b "would allow no such penalties," it is in error. Dissent is to the majority's decision to forbid any reasonable termination or penalty provision to enforce damages for breach provisions.

A reasonable termination provision in one which gives the conferences a right to terminate after an arbitration followed by a finding that a breach of contract is proven and a refusal to pay assessed damages. A provision that if the merchant who has breached his contract, or who has refused to adjudicate a claimed breach, and does not pay promptly the liquidated damages due, or if he breaches his contract twice in a year, his contract shall be termi-

nated and thereafter be required to pay the non-contract rate, is also reasonable and should be permissible if some means of establishing the breach besides a mere assertion by the carrier is provided. Provisions which penalize by keeping the merchant obligated, assessing damages, and suspending his rights to reduced rates might be permissible if suspension is limited until damages are paid or the dispute adjudicated, and if there is provision for a refund with interest if the adjudication goes against the conference. I would permit, but the majority would not permit, these provisions or variations thereof which on examination and analysis were shown not to involve the prohibited effects of Sec. 14b. The majority makes none of the necessary findings as to prohibited effects and justifies its conclusion solely on an interpretation of Sec. 14b (5), apparently supported by legislative intent as an aid to statutory construction.

It is impossible for me to equate the statutory limitation on damages in item (5) recoverable for breach with a provision concerning what happens when a merchant breaches his contract or refuses to pay damages assessed, and concurrently refuses to adjudicate the dispute. We should distinguish between damages and penalties. Refusal to allow such penalties, which have nothing to do with the measurement of damages, would have to be expressly enacted into law to be binding on the Commission. The added prohibition was not put in the law and may not be put there where the legislative intent is so clearly absent. The majority's use of statements showing legislative intent as an aid to statutory construction is applicable only where there is an ambiguity about the

words of the enacted law. There is no such ambiguity here. The damage limitation is clear and may not be stretched to disallow additional penalties for refusal to pay damages or to adjudicate disputes. Therefore, this statement provides no basis for denying an applicant permission to use other types of penalty provisions for refusal to adjudicate or to pay. The Senate Committee's opinion that the bill "would allow no such penalties" never found its way into the law, and we should not put the prohibition in the law if Congress didn't.

The majority also discusses, as generalized issues, several additional issues to the five referred to the panel of examiners in Docket No. 1111. These issues relate to (1) prompt release of shippers from exclusive patronage contract obligations if the conference can not furnish transportation when needed; (2) a prohibition against rate increases before at least 90 days after a rate becomes effective; (3) a prohibition against requiring shippers to divert shipments from a "natural routing" to give patronage; (4) a limitation on the amount of damages chargeable for breach of contract; (5) the right of the shipper to cancel his contract on 90 days' notice; (6) the amount of the differential between contract and non-contract rates; and (7) exclusion of certain bulk cargoes from exclusive patronage contract obligations.

Without agreeing with the reasoning, concurrence with the majority's conclusions in regard to items (1), (3), (5), and (6) is possible, except, of course, to the majority's requirement for the use of standard provisions on the above subjects.

With regard to Item (2), it is impossible to read-in any "overriding intent of the statute" that a prohibition against an increase "before a reasonable period, but in no case less than 90 days" is translatable into a 90-day notice requirement for rates subject to contracts. The statutory notice provisions of Sec. 18(b)(2) speak for themselves and are all the law requires. No contract provision is needed covering such provisions. The required 90-day notice clause requires more than what the Commission may permit applicants to use.

With regard to Item (4) there is a discussion below indicating the belief that suspensions of rights while continuing a merchant's obligations and similar penalties for breaches of contract, which are distinguishable from damages, are normal and permissible methods for enforcing contract obligations. Penalty provisions may be permitted as long as they do not automatically invoke the penalty and require the merchant to sustain the burden of proof of innocence simply on the basis of a carrier's claim of breach of contract.

Lastly, with respect to Item (7), we have no authority to make a general exclusion of liquid bulk petroleum products in less-than-full shipload lots. The statute says the exclusion of commodities must be allowed by the Commission "upon a finding that economic factors so warrant." Economic factors in any given trade covered by a contract must be looked into and a specific finding made, instead of the proposed across-the-board exclusion. The need for findings cannot be avoided by statutory interpretation involving speculation as to what Congress intended.

The following conclusions as to whether or not the Commission should permit the use of specific contracts are subject to the foregoing reservations as to the interpretation of Sec. 14b, even though not expressly referred to in the text that follows.

In the third part of this dissent, each of the 24 types of contract forms is reviewed and conclusions made as to whether we should permit its use. Such procedure is required as a consequence of the belief that under Sec. 14b the Commission's duty to each applicant is to give individual consideration to its contract and that the majority has not discharged this duty properly.

The contracts are taken up in the order of dates on which the examiner served his opinion on the contracts.

The contracts subjected to this review are the contracts initially submitted by the applicants, plus the modifications made as of the close of the hearing with an applicant's consent, and plus the modifications made after the examiner's decision with the applicant's consent as evidenced by a failure to except to the modifications.

The following opinions as to the permissibility of these contracts are qualified by the preceding observations on the generalized issues applicable to contracts.

Docket Nos. 1033, 1034, 1037, 1039:

Four conferences applied for permission to use one contract form for trading from North Atlantic ports to French ports, Mediterranean ports, Baltic ports, and United Kingdom ports in Europe.

The applicants' contract in Article 1(a), as I understand it, requires the parties to negotiate and agree to the affiliates to be obligated and to name them in an "Appendix A" *before* the contract is signed. Disagreement later over the exclusion of an affiliate may not be made the subject of a breach of contract action, if the contract is to be permissible.

Additionally, Article 1(a)(iii) makes the merchant list in Appendix "B" all other affiliates not to be obligated. The latter requirement according to the record is to assist the conference in solicitation for cargo. Such purpose is so remote from the purposes of Sec. 14b and so burdensome on merchants, particularly the large corporate complexes, that it is considered a detriment to commerce and should not be permitted.

Article 1(c) conforms generally to Sec. 14b(8) and excludes liquid bulk cargoes, but also includes petroleum products in less than shipload lots. The examiner, in response to an intervenor's presentation, found that economic factors warranted the exclusion of petroleum products as authorized by item (8). Technical factors differentiating the loading, handling, transporting, and unloading of petroleum products from other types of packaged commodities were proven. Technical factors are not "economic factors;" nevertheless, the technical factors shown have an economic effect on the costs of loading, storing, and berthing of ships and on their handling and storage facilities to accommodate the needs of petroleum shippers sufficiently to sustain the examiner's finding that economic factors warranted a revision of this contract. The examiner's revision is sustainable on the facts of these dockets.

Article 5 requires a merchant to apply to "all" carriers for space, but the examiner changed this to require application to "one or more" carriers. The "all" is excessively burdensome to a merchant, thus a detriment to commerce, and we should not permit the "all" carrier application for space.

Article 8 makes the merchant prove, simply on the basis of a question arising, that he did not divest himself of the right to select a carrier. The conference under Article 7 obligates the merchant to make records available, and the addition of a burden of disproof in response to a question alone, contrary to the normal rule that the person making the charge has the burden of proof, is oppressive to the point of being against the public interest. The examiner's refusal to permit Article 8 should be sustained.

Except as noted with respect to Articles 1, 5, and 8, we should permit the use of the contract in the above dockets.

Docket Nos. 1055, 1056:

Two conferences applied for permission to use one contract form for trading from Pacific Coast ports to ports in the Republic of the United States of Indonesia. The contract available for review did not show any signature page, but if the all-affiliate clause is not used and each party to be obligated is named, we should permit the use of the contract in the above dockets. (It is noted this contract was extensively revised by the examiner, but no exceptions thereto were taken.)

Docket No. 1002:

One conference applied for permission to use a contract form for trading from ports on the Pacific Coast to ports in Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Vietnam, South Vietnam, Cambodia, Republic of the Philippines, and Thailand.

We should permit the use of the subject contract in the above docket.

Docket Nos. 1012, 1020, 1101, 1106:

Four conferences applied for permission to use two contract forms, one for outbound trade and one for inbound trade between India, Pakistan, Ceylon, and Burma area ports and United States Atlantic and Gulf of Mexico ports.

Article 6, 5th paragraph of the outward contract, obligates the merchant to bear the burden of proof if he has to defend himself against a charge he did not have the right to select the carrier. The 4th paragraph requires the merchant to furnish documents. For the reasons noted in the discussion of the contract subject of Docket Nos. 1033, 1034, 1037, and 1039, the use of this provision should not be permitted.

Except as noted with respect to Article 6 above, we should permit the use of these two contracts.

Docket Nos. 1005, 1023, 1031, and 1050:

Four conferences applied for permission to use four contract forms (three conferences use the Far East Conference Merchant's Rate Agreement with minor modifica-

tions) in trading between the United States Pacific, Gulf of Mexico, and Atlantic Coasts to the Republic of the Philippines; from the United States Atlantic and Gulf of Mexico to the Far East (Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Vietnam, Cambodia, and the Republic of the Philippines); from Hong Kong, Amoy, Foochow, and south, Formosa, and Vietnam (excluding Saigon) to United States Atlantic and Gulf Coast; and from the same areas to United States and Canada Pacific Coast and Hawaii.

We should permit the use of this contract, but because it is the first contract to require, for practical purposes, a conclusive presumption test to determine the right to select a carrier, some added comments are offered.

Article 1 (c) makes the bill of lading "shipper" the one who has the legal right to select the carrier, provided there is no such presumption if "the Merchant proves" that his name on the bill is for reasons not related (1) to retention of a security interest and (2) to the transaction between the merchant and his vendor or vendee or the carrier. The proviso to the conclusive presumption in effect contains two exceptions which, for practical purposes, all but cancel out the proviso and leave the conclusive presumption intact. One may complain that this is an overly-clever technique, but the result is still permissible. It has been indicated in the discussion hereinabove that a conclusive presumption might be permitted and the present proposal comes about as close to a conclusive presumption as possible. The use of presumptions as a basis of contract obligations has been criticised above. Possibly the use is inevitable because Congress has

injected "intent" as one of the elements of a breach of contract ("with intent to avoid his obligation").

Normally, intent is used as an element of the violation of criminal laws and is not material in commercial transactions. To make the contract commercially effective, some method of proving speedily this elusive concept is imperative. A contract obligation concerning the proofs to be used to establish a "right may be inevitable, for all its shortcomings, but the majority's effort to confine the use of the evidence to shifting rebuttals prevents any effective execution of Sec. 14b (3). It is a detriment to commerce to provoke commercial disputation by means of a provision that cannot be effectively enforced by anyone.

I dissent from the majority's action in not permitting the use of this applicant's Article 1 (c) which can actually be enforced. We should permit the use of this contract.

Docket Nos. 1001, 1006, 1053:

Three conferences apply for permission to use one contract form in trading between the Gulf of Mexico and the Mediterranean and French Atlantic ports and between South Atlantic and United Kingdom and Eire and Continental European ports. The liquidated-damages provision attempts to conform with Sec. 14b (5) by its Article 9 (a) in which it "is hereby stipulated and agreed that 'the cost of handling' shall be equal . . . to 33⅓% of such freight charges, except that either party, at its option, may elect to prove the actual cost of handling . . . " This should not be permissible because the law refers to "cost", not to arbitrarily chosen amounts even if based on "the experience of the carriers or on estimates." Cost

means what would have been actual cost, which is determinable from schedules of charges and nothing else will do. The merchant is entitled to this deduction from freight otherwise applicable, and it is unfair to ask him to gamble on what he can prove in an expensive arbitration proceeding where the burden of proving the cost may be on the merchant even though he has no easy way of getting the handling cost evidence he will need. The terminal and stevedoring charges are usually billed to the carriers, and the rate schedules are most easily available to the carriers. The use of the third sentence of Article 9 (a) should not be permitted. It is contrary to Sec. 14b (5) to use an arbitrarily fixed amount instead of a reasonable estimate of handling costs.

Except as noted with respect to Article 9, we should permit the use of the contract in the above dockets.

Docket Nos. 1051, 1052:

Two conferences applied for permission to use one contract form in trading from Straits of Malay areas to Pacific Coast ports and New York (inbound).

The Commission should permit the use of the contract in the above dockets.

Docket No. 1007:

One conference applied for permission to use a contract form in trading between the Pacific Coast ports of the United States and the United Kingdom, Ireland, the Scandinavian Peninsula, and Continental Europe.

The applicant failed to include a provision covering natural routing. Sec. 14b (4) requires the Commission to

find, before it may permit use of a contract, that the contract "expressly . . . does not require" diversion of cargoes "from natural routings." Since there is no express provision along these lines in this contract, I would not permit use of this contract unless the provision is included. There is a great deal of logic and plausibility to the applicant's argument that the mandate of item (4) is in negative terms so an absence of any provision requiring diversion is permissible. Unfortunately, the statute, by requiring us to find the contract expressly covers the subject, precludes a disregard of the mandate for reasons of logic.

In other respects we should permit the use of the contract in the above docket.

Docket No. 1046:

One conference applied for permission to use one contract form in trading between the West Coast of Italy, Sicily, and Adriatic ports and the United States North Atlantic range of ports. We should permit the use of the contract in the above docket.

Docket Nos. 1058 and 1059:

One conference applied for permission to use a contract form covering wine and spirits commodities and another contract covering general commodities in trading westbound in the North Atlantic between the United Kingdom and Eire and the United States Atlantic Coast ports.

We should permit the use of the contract in Docket No. 1058, subject to the revision made by the examiner in

Clause 9 which, it is understood, applicants "do not disagree with."

We should also permit the use of the contract in Docket No. 1059, subject (1) to the revision of Clause 8 suggested by the applicants and adopted by the examiner, and (2) to the addition of the arbitration clause proposed by applicants in their motion of February 20, 1964.

Docket Nos. 1015 and 1017:

Two conferences applied for permission to use one contract form in trading from Atlantic and Gulf of Mexico Coast ports to ports in the State of Singapore, Federation of Malaya, Thailand, Colony of Sarawak, Colony of British North Borneo, and the British Protected State of Brunei.

Each applicant proposes a provision giving it the right to increase rates or impose a surcharge on certain contingencies on less notice than authorized by Sec. 18 (b). The examiner correctly refused to permit such provisions. Whatever may be allowed by Sec. 18 (b) is allowed by statute regardless of this contract, but inconsistent contract obligations should be taken out. As the examiner notes, the requirements of Sec. 18 (b) need not be repeated in the contract.

We should permit the use of this contract in the above docket, modified by the examiner.

Docket Nos. 1026, 1027, 1028, and 1029:

Four conferences apply for permission to use one contract form in trading from ports in Indonesia (except the East Coast of Sumatra between Langsa and Indragi) to

ports on the Atlantic Coast and on the West Coast of North America. The Deli-New York agreement also includes Gulf of Mexico ports.

We should permit the use of the contract in the above dockets.

Dockets Nos. 1042, 1043:

Two conferences apply for permission to use one contract in trading between ports in Argentina, Paraguay, and Uruguay in South America and ports in the United States Atlantic Coast and the Gulf of Mexico.

The contract in Docket No. 1043 covers shippers from the Great Lakes area. The facts showed that at the time of the hearings only one member of the conference actually served the Great Lakes area, providing service only once each month during the eight-month navigation season. The conference operates on a ⅔ds voting rule. Rate questions would be decided by 13 of the 14 conference members. This means that carriers not serving the Great Lakes area would fix the rates and might even fix rates at a level at which the member carrier could not attract business. The lack of interest in Great Lakes trade by such a substantial number of carriers dictates that the conference not be allowed to tie up shippers to an exclusive patronage contract until it can show a larger commercial interest.

Other evidence showed that one shipper located in the Great Lakes area shipped from Gulf, Atlantic, and Great Lakes ports and if it should be tied in to the conference on the Great Lakes to get service elsewhere, it would be tied in with inadequate service. The possibility of inade-

quacy was reinforced by a showing that the conference carrier in the area had imposed a limitation of the amount of the shipper's cargo it would accept, preventing the shipper from making a sale for a larger amount of cargo, for lack of other available carrier space.

The proposed restraint on shippers and control over rates by parties without a more serious interest in the trade and a better ability to handle shipments would be a detriment to commerce.

We should not permit the use of the contract in Docket No. 1043 unless its scope is changed to omit any requirement that Great Lakes area shippers must sign up. In other respects we should permit the use of this contract in these dockets.

Docket Nos. 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018:

Thirteen conferences applied for permission to use one contract in trading between Atlantic and Gulf of Mexico Coast ports and ports in Central America and the Carribbean area and Venezuela and the north coast of Colombia ports and another contract in trading between Atlantic and Gulf of Mexico ports and the west coast of Colombia, Ecuador, Peru and Chile.

We should permit the use of the contract in the subject dockets.

Docket No. 1049:

One conference applied for permission to use a contract in trading from ports on the U. S. Atlantic and Gulf of Mexico to ports in Australia and New Zealand.

This contract, as it is now before us, covers Great Lakes ports even though the conference agreement of association does not authorize rate-fixing agreements covering such ports. The contract subject of the initial application did not include such coverage. Until the conference agreement is expanded and the Commission thereafter permits the use of this contract in Great Lakes trading based on the facts shown to exist at the time of a further application for permission to use a contract tieing shippers in the Great Lakes area, permission should not be given to use the contract. There is not enough record evidence for a decision on Great Lakes coverage at this time.

Subject to the exclusion of an obligation to ship via conference carriers from the Great Lakes area, we should permit the use of the contract in this docket.

Docket Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, and 1057:

Ten conferences apply for permission to use one contract form in trading between Pacific Coast ports and ports in Latin America, other than ports on the east coast of South America.

Each applicant's Articles 1 and 3 require the merchant to "give all his patronage to the carriers." This language is not equivalent to the requirements of Sec. 14b that the contract "expressly" cover "only those goods of the contract shipper" of which he has "the legal right at the time of shipment to select the carrier." This contract is either silent on the subject of coverage, as delineated by

the "legal right" to select provision, or is so uncertain as to be meaningless. The reference to "patronage" in each applicant's Article 1 has no clear or necessary relation to "those goods" or to legal rights therein which Item (3) prescribes to describe the necessary obligations of the parties. Under Sec. 14b (3) the parties must examine evidence as to the merchant's other agreements with respect to the goods to find out whether the contract obligation to select a conference carrier applies or not, and may not be compelled to define anything so vague as "patronage", before the obligation to select can be established. Each applicant's provision does not comply with Sec. 14b (3) and may not be permitted.

Article 6 provides that if no carrier "is able to furnish reasonably prompt space for specific shipments when requested by the shipper" the latter will be free to use non-conference ships. Sec. 14b (1) requires the contract to permit "prompt release of the contract shipper" under the same circumstances. In most cases an exact conformity with statutory language would be unimpeachable, but in this case it is believed Congress meant that applicants should do a little more than embody a source of dispute over what is "prompt" in the contract by establishing an ascertainable period of time, and that the Commission should review the proposed time limit in the context of the particular circumstances. A provision which specifies only "prompt" and does not specify a time should not be permitted because it does not comply with Sec. 14b (1).

Except as noted with respect to Articles 1 and 6 above, we should permit the use of the contract in these dockets.

Docket Nos. 1109, 1110:

Two carriers applied for permission to use a contract form in trading between United States ports and Turkish ports. During the proceedings the Ipar Transport tariff and application to use a contract was withdrawn, leaving the only respondent-applicant D. B. Turkish Cargo Line. The latter's contract is the only one subject to this report.

We should permit the use of the contract only as modified by the examiner in this docket.

Docket No. 1081:

(This docket was the first in the order of dates in which the examiner served his opinion).

One conference applied for permission to use a contract form for trading from the West Coast of India and Pakistan to United States Atlantic and Gulf of Mexico ports.

Subject to the comments herein, the Commission should permit the use of the contract in the above docket.

This report is confined to a discussion of exclusive patronage contracts and not to conference agreements under Sec. 15 of the Act.

/s/ John S. Patterson
John S. Patterson
Commissioner

March 30, 1964

FEDERAL MARITIME COMMISSION

DOCKET No. 1007

PACIFIC COAST EUROPEAN CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

ORDER

Full investigation in this proceeding having been had, and the Commission on this day having made and entered of record a report stating its findings and conclusions thereon, which report is hereby referred to and made a part hereof, and having found that the agreements submitted to the Commission should be approved with modifications made by the Commission;

Now, Therefore, It is Ordered, That the agreements submitted to the Commission by the respondents in the above proceedings are hereby approved in the form attached to this order; and

It is Further Ordered, That effective 12.01 A.M. (EST) on Saturday, April 4, 1964, the terms of the agreement attached hereto shall be used by the respondents in the above proceedings in accordance with said report to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission, March 27, 1964.

/s/ Thomas Lisi
Thomas Lisi
Secretary

APPENDIX 5

APPROVED CONTRACT FORM

(DOCKET 1007)

PACIFIC COAST EUROPEAN CONFERENCE

417 Montgomery Street—San Francisco 4—California

SHIPPER RATE AGREEMENT

THIS AGREEMENT, made as of the day and date set forth below, by and between the SHIPPER named below and the several steamship lines named at the end hereof, hereinafter called the CARRIERS,

WITNESSETH:

1.(a) The Shipper undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and non-contract rates are offered, from Pacific Coast ports of the States of Washington, Oregon and California, to ports of call in the United Kingdom of Great Britain and Northern Ireland, Ireland, the Scandinavian Peninsula, Continental Europe, including ports on and in the Baltic and the Mediterranean Seas, as well as the seas bordering thereon (except the Black Sea), and Morocco, on vessels of the Carriers unless otherwise provided in this agreement.

The term "Shipper" shall include the party signing this contract as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in

relation to shipping matters, whether the shipments are made by or in the name of the "Shipper" any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of who shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Shipper" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Shipper.

The Carriers agree that they will not provide contract rates to anyone not bound by a shippers rate agreement with the Carriers. The Shipper agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person. The contract rates shown in the applicable tariff shall be less than the non-contract rates by 15% of the non-contract rates.

(b) This Agreement excludes cargo of the Shipper which is loaded and carried in bulk without mark or count, except liquid bulk cargoes, other than chemicals and petroleum products, in less than full shipload lots, or

cargo carried in merchant-owned vessels or merchant-chartered vessels where the term of the charter is for six months or longer.

(c) (1) If the Shipper has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Shipper shall select one or more of the Carriers.

(2) If Shipper's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Shipper to select the carrier, Shipper shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the Shipper, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Shipper shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.

(a) with respect to which the Shipper arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(b) with respect to which the Shipper's name appears on the bill of lading or export declaration as shipper or consignee.

(5) Nothing contained in this Agreement shall require the Shipper to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(d) This agreement does not require the Shipper to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. Provided, however, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Shipper shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Shipper intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which Shipper intends to ship or receive his goods is within the scope of this Agreement, Shipper shall first so notify the conference in accordance with the provisions of Article 4 hereof.

2.(a) If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impractical to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate in effect at the time of the shipment less the estimated cost of loading and unloading which would have been

incurred had the shipment been made on a Conference vessel.

(b) (1) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages.

(2) If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 9, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages.

(3) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(4) Payment of damages shall automatically terminate suspension.

(5) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

(c) Except as hereinabove provided, damages for breach of this Agreement shall be actual damages to be determined after breach in accordance with the principles of contract law.

(d) In order that the conference may investigate the facts as to any shipment of the Shipper that has moved,

or that the Shipper or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Shipper, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Shipper where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Shipper and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

(e) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however,* That where the activities of Merchants are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

3. This agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and conditions of the current Conference Tariff

on file with the Federal Maritime Commission and the respective Carrier's engagement note, permit, dock receipt, mate's receipt and bill of lading regularly in use by the individual Carrier when shipments are tendered. With respect to contracts of carriage made between the Shipper and one of the Carriers, none of the other companies referred to as Carriers shall be liable jointly or severally, or in any way or to any extent.

4. The Carriers severally agree to furnish from time to time, when requested, at the applicable contract rates and subject to the conditions hereafter stated, space for the aforesaid shipments of the Shipper to the discharging ports of the Carrier(s), provided that such space is available when the Shipper makes application therefor. In the event that none of the Carriers is able to furnish reasonably prompt space for specific shipments when requested by the Shipper, the latter will be free to forward such shipments by any vessel other than those of the Carriers without violating this Agreement, provided that the Shipper first notifies the Conference at San Francisco in writing of its inability to obtain space required, and allows the Conference forty-eight hours after receipt of such notice to confirm that the space is not available.

5. For the purpose of giving Shipper notices of changes in rates, the Shipper may furnish the Conference a list of commodities in which the Shipper is interested. If requested by the Shipper (but not otherwise)the Shipper shall thereafter receive written notice of changes of rates applicable to said commodities.

6.(a) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results

in an increase or decrease in cost to the Shipper, except as provided by Section 18(b) (2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,* the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the Pacific Coast European Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Shipper, the Shipper may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however,* that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Shipper in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Shipper's notice of termination had never been given.

(b) The Conference shall offer to the Shipper a subscription to its tariffs at a reasonably compensatory price, however, the Shipper shall be bound by all notices accomplished as aforesaid without regard to whether it sub-

scribes to the Conference tariff. Tariffs shall be open to the Shipper's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Maritime Commission rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this agreement.

7.(a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the carriers in the trade covered by this Agreement, the carrier or carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the shipper of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any carrier or carriers, said carrier or carriers shall forthwith reassume its or their rights and obligations hereunder and notify the Shipper on fifteen (15) days' written notice that its suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 7a, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such con-

ditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the Shipper, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 7a, which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Shipper may, not less than 10 days' before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

8.(a) The Shipper and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the

demands of the Shipper and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

(b) Additional commodities may be placed on a contract rate basis from time to time.

9. Should the Carriers during the period of this Agreement reduce rates on any commodity on which contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates during the period same remains in effect.

10. In case of dispute, the Shipper and the Carrier(s) each agree to submit the matter under dispute to arbitration, each appointing an arbitrator and the two so chosen shall select an umpire to which Arbitration Committee all data requested in connection with the matter in dispute shall be made available. Decision of two or more members of the said Committee shall be binding on the parties and the arbitration shall be made under and pursuant to the terms and conditions of the United States Arbitration Act, *9 U.S.C. 1 et seq.*, all of which terms and conditions shall

be binding upon the parties hereto. Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

11. Unless earlier terminated as herein provided, this Agreement shall remain in effect indefinitely, provided, however, it may be terminated by either party giving to the other ninety (90) days written notice of intention to terminate the same.

12. This agreement shall be construed in the light of the Shipping Act, 1916, and the Rules and Regulations of the Federal Maritime Commission.

13. This agreement may be amended from time to time with the permission of the Federal Maritime Commission.

* _____ * _____

Shipper (Show full Corporate, Company or Individual Name) (Street Address)

*

By _____ * _____

(Signature of Company Official and Title) (City, Postal Zone and State)

* _____

(Typed Name of Official and Title)

Dated as of _____ For and on behalf of the Carriers shown on the reverse hereof:

* _____ By _____

Shipper is requested to fill in the required data in spaces indicated by stars (*)

_____

Carriers

Referred to on face hereof

(List of Conference Members)

Appendix "A"

FEDERAL MARITIME COMMISSION

DOCKET NO. 1003—CAPCA FREIGHT CONFERENCE

DOCKET NO. 1009—COLPAC FREIGHT CONFERENCE

DOCKET NO. 1010—CANAL, CENTRAL AMERICA NORTHBOUND CONFERENCE

DOCKET NO. 1011—CAMEXCO FREIGHT CONFERENCE

DOCKET NO. 1018—ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES

DOCKET NO. 1035—PACIFIC COAST/CARIBBEAN SEA PORTS CONFERENCE

DOCKET NO. 1040—PACIFIC COAST/MEXICO FREIGHT CONFERENCE

DOCKET NO. 1041—PACIFIC COAST/PANAMA CANAL FREIGHT CONFERENCE

DOCKET NO. 1044—PACIFIC/WEST COAST OF SOUTH AMERICA CONFERENCE

DOCKET NO. 1057—PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACTS

DOCKET NO. 1092

IN THE MATTER OF AGREEMENT NO. 8660—LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND PROPOSED CONTRACT RATE SYSTEM

ORDER

Full investigation in this proceeding having been had, and the Commission on this day having made and entered

of record a report stating its findings and conclusions thereon, which report is hereby referred to and made a part hereof, and having found that the agreements submitted to the Commission should be approved with modifications made by the Commission;

Now, Therefore, It is Ordered, That the agreements submitted to the Commission by the respondents in the above proceedings are hereby approved in the form attached to this order; and

It is Further Ordered, That effective 12.01 A.M. (EST) on Saturday, April 4, 1964, the terms of the agreement attached hereto shall be used by the respondents in the above proceedings in accordance with said report to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission, March 27, 1964.

/s/ Thomas Lisi
Thomas Lisi
Secretary

APPENDIX 3

APPROVED CONTRACT FORM
(DOCKET 1003 et seq.)

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

417 Montgomery Street
San Francisco 4, California

SHIPPERS' RATE AGREEMENT

From Pacific Coast Ports of the
United States and Canada to Ports
in Central and South America.

This Agreement, made as of the day and year set forth below, by and between the Shipper named below and the several steamship lines named on the reverse side hereof hereinafter called the Carriers).

Witnesseth:

1. *Purpose of this Agreement:*

The purpose of this Agreement is to foster the maintenance of uniform and stable freight rates and adequate service in the trades from the Pacific Coast of the United States and Canada to Central and South America, as more particularly described in Article 2 of this Agreement. In order to accomplish the purpose of this Agreement, the Shipper shall give all of his patronage to the Carriers (unless specifically excluded herein), and, in consideration thereof, the Carriers shall give to the Shipper special, reduced rates of freight and other special benefits all as more fully set forth hereinafter.

2. *Trades covered by this Agreement:*

This Agreement covers the transportation by water of goods from Pacific Coast ports of the United States and Canada to the following:

All ports in British Guiana, British Honduras, British West Indies, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, French Guiana, French West Indies, Guatemala, Honduras, Haiti, Netherland Antilles, Nicaragua, Peru, Republic of Panama, Surinam, Venezuela, Pacific and Atlantic Coast ports of Mexico and to the Canal Zone ports of Balboa and Cristobal.

3. *Shipments Covered by this Agreement:*

(a) The Shipper undertakes to ship or cause to be shipped all of its ocean shipments for which contract and non-contract rates are offered, moving in the trade on vessels of the Carriers unless otherwise provided in this Agreement. This agreement excludes: (1) shipments of cargo which are loaded and carried in bulk without mark or count other than liquid bulk cargoes, except chemicals and petroleum products, in less than full shipload lots, (2) shipments of commodities on which the rates of the Carriers are declared "open" in the tariff or tariffs of the Carriers applicable in trades covered by this Agreement, (3) shipments of commodities for which contract rates are not provided in the tariffs of the Carriers, and (d) shipment on vessels owned by merchant or chartered by merchant for a period of not less than six months.

The term "Shipper" shall include the party signing this contract as shipper and any of his parent, subsidiary,

or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Shipper" any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Shipper" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms, or entities affiliated with or related to the Shipper.

The Carriers agree that they will not provide contract rates to anyone not bound by a shippers rate agreement with the Carriers. The Shipper agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person.

(b) (1) If the shipper has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Shipper shall select one or more of the Carriers.

(2) If shipper's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits shipper to select the carrier, shipper shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the shipper, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Shipper shall be deemed prima facie to have the legal right at the time of shipment, to select the carrier for any shipment:

a. with respect to which the Shipper arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

b. with respect to which Shipper's name appears on the bill of lading or export declaration as shipper or consignee.

(5) Nothing contained in this Agreement shall require the shipper to refuse to purchase, sell or transfer any

goods on terms which vest the legal right to select the carrier in any other person.

(c) This agreement does not require the shipper to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. Provided, however, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the shipper shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever shipper intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which shipper intends to ship or receive his goods is within the scope of this agreement, shipper shall first so notify the conference in accordance with the provisions of Article 6 hereof.

4. *Rates of Freight:*

The CARRIERS agree to maintain rates of freight for the benefit of the SHIPPER lower than the ordinary rates on all commodities covered by this Agreement. In the absence of an accomplished Agreement the ordinary rate shall be 15% higher than the Contract (reduced) rate.

5. *Contracts of Carriage:*

This agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. With respect to contracts of carriage made between the Shipper and one of the Carriers, none of the other companies referred to as Carriers shall be liable jointly or severally, or in any way or to any extent.

The SHIPPER shall have the option of selecting any of the vessels operated by the several CARRIERS, subject to specific agreement between the transporting carrier and the SHIPPER as to quantity to be shipped on the carrying vessel, port or ports of loading and discharge, and as to all other matters affecting the transportation proper. This Agreement and any shipments made pursuant hereto, are subject to all the terms, conditions and exceptions expressed in the space booking contract, permits, dock receipts, mate's receipts and regular forms of bills of lading of the transporting carriers in use at the time of shipment, and to all of the rates, rules and regulations of the applicable Conference tariff.

6. *Release of SHIPPER:*

The CARRIERS severally agree to furnish from time to time, when requested by the SHIPPER, at the applicable contract rates, and subject to the conditions hereinafter stated, space for the aforesaid shipments of the SHIPPER to the discharging ports of the CARRIERS, provided that such space is available when the SHIPPER makes application therefor. In the event that none of the CARRIERS is able to furnish reasonably prompt space for specific shipments when requested by the SHIPPER,

the latter will be free to forward such shipments by any vessel other than those of the CARRIERS without prejudice to the SHIPPER'S rights under this Agreement, provided that the SHIPPER first notifies the Conference at San Francisco in writing of its inability to obtain space required, and allows the Conference forty-eight hours, not including Saturdays, Sundays and holidays, after receipt of such notice to confirm that the space is not available on the vessels of the CARRIERS.

7. *Notice of Rate Changes:*

(a) For the purpose of receiving notices of changes in rates from the CARRIERS, other than by required tariff publication, the SHIPPER shall furnish to the Conference a list of commodities in which the SHIPPER is interested and, if requested by the SHIPPER, the CARRIERS shall thereafter give the SHIPPER prompt notice of all changes in rates applicable to commodities covered by this Agreement for which the SHIPPER requests such notice.

(b) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the shipper, except as provided by Section 18(b) (2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,* the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance

in the _____ Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the shipper, the shipper may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however,* that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the shipper in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the shipper's notice of termination had never been given.

(c) The Conference shall offer to the shipper a subscription to its tariffs at a reasonably compensatory price, however, the shipper shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the shipper's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(d) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Maritime Commission rather than to have become effective with the signing of this Agreement and notices of

proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this agreement.

(e) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the carriers in the trade covered by this Agreement, the carrier or carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the shipper of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any carrier or carriers, said carrier or carriers shall forthwith reassume its or their rights and obligations hereunder and notify the shipper on fifteen (15) days' written notice that its suspension is terminated.

(f) In the event of any of the conditions enumerated in Article 7(e), which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the shipper, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such

event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(g) In the event of any extraordinary conditions not enumerated in Article 7(e), which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The shipper may, not less than 10 days' before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

8. *Rate Reductions:*

The CARRIERS shall give to the SHIPPER the full benefit of all rate reductions on commodities covered by this Agreement during the entire time such reductions are in effect.

9. *Additional CARRIERS:*

Any steamship line which may hereafter engage in the trades covered by this Agreement, and become a member of the Conference, shall thereby, and without further action on the part of the SHIPPER or the line, become

a party to this Agreement, and the SHIPPER shall have the right to request shipping space of such line in accordance with all of the terms and conditions of this Agreement. Should any line or lines for any reason cease to be members of the Conference, then, following the expiration of thirty (30) days written notice of such cessation of membership given by the Conference to the SHIPPER, all future rights under this Agreement of such line or lines and of the SHIPPER as to any such line or lines shall cease and terminate.

10. *Breach of Agreement:*

(a) Damages for breach of this agreement shall be liquidated damages, computed by the amount the Shipper would have paid had he used a vessel of the CARRIERS at the contract rate or rates currently in effect, less the cost of loading and unloading.

(b) Upon the failure of the Shipper to pay or dispute his liability to pay liquidated damages as herein specified for breach of the agreement within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Shipper's rights and obligations under the agreement until he pays such damages.

(c) If, within 30 days after receipt of such notice the Shipper notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 11, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid

within 30 days after the adjudication becomes final, the Conference shall suspend the Shipper's rights and obligations under the contract until he pays the damages.

(d) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(e) Payment of damages shall automatically terminate suspension.

(f) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

(g) In order that the conference may investigate the facts as to any shipment of the Shipper that has moved, or that the Shipper or the conference believes has moved, via a non-conference carrier, and upon written request clearly so specifying, the Shipper, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Shipper where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Shipper and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

(h) Within ten (10) days after the event in any transaction in which the Shipper is a party and the legal right to select the carrier is vested in a person other than the Shipper, and if he has knowledge that the shipment

has been made via a nonconference carrier, the Shipper shall notify the conference in writing of this fact, giving the names of the shipper and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however,* That where the activities of Shippers are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Shipper shall give notice as promptly as possible after the event.

11. *Arbitration:*

In case of any dispute under this Agreement, the parties agree to submit the dispute to arbitration, each party appointing an arbitrator and the two so chosen to select an umpire, to which Arbitration Committee all data, information and material requested by the Committee or by either party shall be furnished. Either party may demand arbitration by mailing to the other written notice thereof, specifying the name and address of the arbitrator chosen by it, and a brief description of the matter in dispute. If either party fails, within thirty (30) days of the mailing of the first party's notice demanding arbitration, to appoint an arbitrator as required by the terms of this article, then the other party shall have the right, without further notice, to appoint the second arbitrator with the same force and effect as if the second arbitrator had been appointed by the party receiving notice of a demand for arbitration. The decision, in writing, of two or more members of said Arbitration Committee shall be binding upon all parties, and any award shall be paid within thirty (30) days after a copy of the decision of the Arbi-

tration Committee has been mailed by the Committee to the party held liable, failing which payment, judgment upon the award may be entered in any court having jurisdiction. Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

12. *Cancellation:*

Unless earlier terminated as herein provided, this Agreement shall remain in effect indefinitely provided, however, it may be cancelled by either party giving to the other ninety (90) days written notice of intention to terminate the same.

13. *Applicability of Shipping Act and Contract Amendments:*

(a) This agreement shall be construed in the light of the Shipping Act, 1916, and the Rules and Regulations of the Federal Maritime Commission.

(b) This agreement may be amended from time to time subject to the permission of the Federal Maritime Commission.

In Witness Whereof, the parties have executed this Agreement the_____day of_____,____.

Appendix A:

Note: The clause approved by the Federal Maritime Commission relating to "open rates" may be used in this contract at the option of the Carriers.

Served
June 24, 1965
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

DOCKET NO. 1007

PACIFIC COAST EUROPEAN CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

ORDER ON REMAND

On February 8, 1965, the United States Court of Appeals for the Ninth Circuit set aside our order issued in this proceeding dated March 27, 1964, which order approved for use by the respondent in this proceeding a dual rate contract for the purpose of according merchants, shippers, and consignees contract rates, in the form appended to the Order of March 27th.

The Court of Appeals concluded in its opinion that "opportunity must be afforded petitioners to participate in rule making in such manner as the Commission may direct pursuant to section 4(b) [of the Administrative Procedure Act]; such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in the hearings in petitioners' adjudicatory dockets or in Docket 1111." *Mimeo Decision*, pp. 15-16. The Commission has reviewed the contracts, the court's opinion, and the proceedings before the Commission, and has this day issued a Notice of Proposed Rulemaking with respect to such clauses as the court had in mind in the above-quoted text.

The Court of Appeals also said: "We gather that this area in which petitioners have already participated covers

the greater portion of the contract as approved by the Commission. As to that portion, the Commission, is, of course, free forthwith to promulgate rules and establish the substance of approved contracts as to petitioners." *Mimeo Decision,* p. 16. This order is intended to accomplish that result.

The Commission issued its report in this proceeding on March 27, 1964, and that report is hereby referred to and made a part hereof, except for that portion which may be inconsistent with the Opinion of the United States Court of Appeals for the Ninth Circuit in *Pacific Coast European Conference, et al. v. Federal Maritime Commission and United States of America,* (Nos. 19,237, 19,238, and 19,239, 9th Cir., February 3, 1965).

Now, Therefore, It is Ordered, That the agreement submitted to the Commission by the respondent in the above proceeding is hereby approved by the Commission in the form attached to this order, the Commission having found, for the reasons stated in its Report entered on March 27, 1964, that approval should be conditioned on the inclusion of certain modifications made by the Commission; and

It is Further Ordered, That the terms of the agreement attached hereto (subject to the Commission's order of July 31, 1964) be used by the respondent in this proceeding to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission.

(Seal) /s/ Thomas Lisi
Thomas Lisi
Secretary

APPENDIX 5

APPROVED CONTRACT FORM

(DOCKET 1007)

PACIFIC COAST EUROPEAN CONFERENCE

417 Montgomery Street—San Francisco 4—California

SHIPPER RATE AGREEMENT

This Agreement, made as of the day and date set forth below, by and between the SHIPPER named below and the several steamship lines named at the end hereof, hereinafter called the CARRIERS,

Witnesseth:

1.(a) The Shipper undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and non-contract rates are offered, from Pacific Coast ports of the States of Washington, Oregon and California, to ports of call in the United Kingdom of Great Britain and Northern Ireland, Ireland, the Scandinavian Peninsula, Continental Europe, including ports on and in the Baltic and the Mediterranean Seas, as well as the seas bordering thereon (except the Black Sea), and Morocco, on vessels of the Carriers unless otherwise provided in this agreement.

The term "Shipper" shall include the party signing this contract as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession

of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Shipper" any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Shipper" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Shipper.

The Carriers agree that they will not provide contract rates to anyone not bound by a shippers rate agreement with the Carriers. The Shipper agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person. The contract rates shown in the applicable tariff shall be less than the non-contract rates by 15% of the non-contract rates.

(b) This Agreement excludes cargo of the Shipper which is loaded and carried in bulk without mark or count,

except liquid bulk cargoes, other than chemicals and petroleum products, in less than full shipload lots, or cargo carried in merchant-owned vessels or merchant chartered vessels where the term of the charter is for six months or longer.

(c)(1) If the Shipper has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Shipper shall select one or more of the Carriers.

(2) If Shipper's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Shipper to select the carrier, Shipper shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the Shipper, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Shipper shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.

(a) with respect to which the Shipper arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(b) with respect to which the Shipper's name appears on the bill of lading or export declaration as shipper or consignee.

(5) Nothing contained in this Agreement shall require the Shipper to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(d) This agreement does not require the Shipper to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. Provided, however, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Shipper shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Shipper intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which Shipper intends to ship or receive his goods is within the scope of this Agreement, Shipper shall first so notify the conference in accordance with the provisions of Article 4 hereof.

2.(a) If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impractical to determine. Such liquidated dam-

ages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate in effect at the time of the shipment less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a Conference vessel.

(b) (1) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages.

(2) If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 9, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages.

(3) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(4) Payment of damages shall automatically terminate suspension.

(5) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

(c) Except as hereinabove provided, damages for breach of this Agreement shall be actual damages to be determined after breach in accordance with the principles of contract law.

(d) In order that the conference may investigate the facts as to any shipment of the Shipper that has moved, or that the Shipper or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Shipper, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Shipper where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Shipper and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

(e) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however,* That where the activities of Merchants are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the

Merchant shall give notice as promptly as possible after the event.

3. This agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and conditions of the current Conference Tariff on file with the Federal Maritime Commission and the respective Carrier's engagement note, permit, dock receipt, mate's receipt and bill of lading regularly in use by the individual Carrier when shipments are tendered. With respect to contracts of carriage made between the Shipper and one of the Carriers, none of the other companies referred to as Carriers shall be liable jointly or severally, or in any way or to any extent.

4. The Carriers severally agree to furnish from time to time, when requested, at the applicable contract rates and subject to the conditions hereafter stated, space for the aforesaid shipments of the Shipper to the discharging ports of the Carrier(s), provided that such space is available when the Shipper makes application therefor. In the event that none of the Carriers is able to furnish reasonably prompt space for specific shipments when requested by the Shipper, the latter will be free to forward such shipments by any vessel other than those of the Carriers without violating this Agreement, provided that the Shipper first notifies the Conference at San Francisco in writing of its inability to obtain space required, and allows the Conference forty-eight hours after receipt of such notice to confirm that the space is not available.

5. For the purpose of giving Shipper notices of changes in rates, the Shipper may furnish the Conference a list of commodities in which the Shipper is interested.

If requested by the Shipper (but not otherwise) the Shipper shall thereafter receive written notice of changes of rates applicable to said commodities.

6.(a) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Shipper, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,* the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the Pacific Coast European Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Shipper, the Shipper may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however,* that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Shipper in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Shipper's notice of termination had never been given.

7.(a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the carriers in the trade covered by this Agreement, the carrier or carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the shipper of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any carrier or carriers, said carrier or carriers shall forthwith reassume its or their rights and obligations hereunder and notify the Shipper on fifteen (15) days' written notice that its suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 7a, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the Shipper, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 7a, which conditions may unduly

impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Shipper may, not less than 10 days' before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

8.(a) The Shipper and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Shipper and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety days' notice by the Carriers

through the filing of contract-non-contract rates in their tariff.

(b) Additional commodities may be placed on a contract rate basis from time to time.

9. Should the Carriers during the period of this Agreement reduce rates on any commodity on which contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates during the period same remains in effect.

10. In case of dispute, the Shipper and the Carrier(s) each agree to submit the matter under dispute to arbitration, each appointing an arbitrator and the two so chosen shall select an umpire to which Arbitration Committee all data requested in connection with the matter in dispute shall be made available. Decision of two or more members of the said Committee shall be binding on the parties and the arbitration shall be made under and pursuant to the terms and conditions of the United States Arbitration Act, *9 U.S.C. 1 et seq.*, all of which terms and conditions shall be binding upon the parties hereto. Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

11. Unless earlier terminated as herein provided, this Agreement shall remain in effect indefinitely, provided, however, it may be terminated by either party giving to the other ninety (90) days written notice of intention to terminate the same.

12. This agreement shall be construed in the light of the Shipping Act, 1916, and the Rules and Regulations of the Federal Maritime Commission.

13. This agreement may be amended from time to time with the permission of the Federal Maritime Commission.

*_____ *_____

Shipper (Show full Corporate, Company or Individual Name) (Street Address)

*By_____ *_____

(Signature of Company Official and Title) (City, Postal Zone and State)

*_____

(Typed Name of Official and Title)

Dated as of For and on behalf of the Carriers shown on the reverse hereof:

*_____ By_____

Shipper is requested to fill in the required data in spaces indicated by stars(*)

Carriers
Referred to on face hereof
(List of Conference Members)

Appendix "A"

Served
June 24, 1965
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

DOCKET No. 1057

PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

DOCKET No. 1092

AGREEMENT No. 8660—LATIN AMERICA/PACIFIC COAST
STEAMSHIP CONFERENCE AND PROPOSED
CONTRACT RATE SYSTEM

ORDER ON REMAND

On February 3, 1965, the United States Court of Appeals for the Ninth Circuit set aside our order issued in these proceedings dated March 27, 1964, which order approved for use by the respondents in these proceedings a dual rate contract for the purpose of according merchants, shippers, and consignees contract rates, in the form appended to the Order of March 27th.

The Court of Appeals concluded in its opinion that "opportunity must be afforded petitioners to participate in rule making in such manner as the Commission may direct pursuant to section 4(b) [of the Administrative Procedure Act]; such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in the hearings in petitioners'

adjudicatory dockets or in Docket 1111." *Mimeo Decision*, pp. 15-16. The Commission has reviewed the contracts, the court's opinion, and the proceedings before the Commission, and has this day issued a Notice of Proposed Rulemaking with respect to such clauses as the court had in mind in the above-quoted text.

The Court of Appeals also said: "We gather that this area in which petitioners have already participated covers the greater portion of the contract as approved by the Commission. As to that portion, the Commission, is, of course, free forthwith to promulgate rules and establish the substance of approved contracts as to petitioners." *Mimeo Decision*, p. 16. This order is intended to accomplish that result.

The Commission issued its report in this proceeding on March 27, 1964, and that report is hereby referred to and made a part hereof, except for that portion which may be inconsistent with the Opinion of the United States Court of Appeals for the Ninth Circuit in *Pacific Coast European Conference, et al.* v. *Federal Maritime Commission and United States of America* (Nos. 19,237, 19,238, and 19,239, 9th Cir., February 3, 1965).

Now, Therefore, It Is Ordered, That the agreements submitted to the Commission by the respondents in the above proceedings are hereby approved by the Commission in the form attached to this order, the Commission having found, for the reasons stated in its Report entered on March 27, 1964, that approval should be conditioned on the inclusion of certain modifications made by the Commission; and

It is Further Ordered, That the terms of the agreement attached hereto (subject to the Commission's order of July 31, 1964) be used by the respondents in these proceedings to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission.

(Seal) /s/ Thomas Lisi
Thomas Lisi
Secretary

APPENDIX 3

APPROVED CONTRACT FORM
(DOCKET 1003 et seq.)

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE
417 Montgomery Street
San Francisco 4, California

SHIPPERS' RATE AGREEMENT

From Pacific Coast Ports of the
United States and Canada to ports
in Central and South America.

THIS AGREEMENT, made as of the day and year set forth below, by and between the SHIPPER named below and the several steamship lines named on the reverse side hereof (hereinafter called the CARRIERS).

WITNESSETH:

1. *Purpose of this Agreement:*

The purpose of this Agreement is to foster the maintenance of uniform and stable freight rates and adequate service in the trades from the Pacific Coast of the United States and Canada to Central and South America, as more particularly described in Article 2 of this Agreement. In order to accomplish the purpose of this Agreement, the SHIPPER shall give all of his patronage to the CARRIERS (unless specifically excluded herein), and, in consideration thereof, the CARRIERS shall give to the SHIPPER special, reduced rates of freight and other special benefits all as more fully set forth hereinafter.

2. *Trades covered by this Agreement:*

This Agreement covers the transportation by water of goods from Pacific Coast ports of the United States and Canada to the following:

All ports in British Guiana, British Honduras, British West Indies, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, French Guiana, French West Indies, Guatemala, Honduras, Haiti, Netherlands Antilles, Nicaragua, Peru, Republic of Panama, Surinam, Venezuela, Pacific and Atlantic Coast ports of Mexico and to the Canal Zone ports of Balboa and Cristobal.

3. *Shipments Covered by this Agreement:*

(a) The Shipper undertakes to ship or cause to be shipped all of its ocean shipments for which contract and non-contract rates are offered, moving in the trade on vessels of the Carriers unless otherwise provided in this Agreement. This agreement excludes: (1) shipments of cargo which are loaded and carried in bulk without mark or count other than liquid bulk cargoes, except chemicals and petroleum products, in less than full shipload lots, (2) shipments of commodities on which the rates of the CARRIERS are declared "open" in the tariff or tariffs of the CARRIERS applicable in trades covered by this Agreement, (3) shipments of commodities for which contract rates are not provided in the tariffs of the CARRIERS, and (d) shipment on vessels owned by merchant or chartered by merchant for a period of not less than six months.

The term "Shipper" shall include the party signing this contract as shipper and any of his parent, subsidiary,

or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Shipper" any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Shipper" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms, or entities affiliated with or related to the Shipper.

The Carriers agree that they will not provide contract rates to anyone not bound by a shippers rate agreement with the Carriers. The Shipper agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person.

(b) (1) If the shipper has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Shipper shall select one or more of the Carriers.

(2) If shipper's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits shipper to select the carrier, shipper shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the shipper, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Shipper shall be deemed prima facie to have the legal right at the time of shipment, to select the carrier for any shipment:

a. with respect to which the Shipper arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

b. with respect to which the Shipper's name appears on the bill of lading or export declaration as shipper or consignee.

(5) Nothing contained in this Agreement shall require the shipper to refuse to purchase, sell or transfer any

goods on terms which vest the legal right to select the carrier in any other person.

(c) This agreement does not require the shipper to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. Provided, however, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the shipper shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by the economis criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever shipper intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which shipper intends to ship or receive his goods is within the scope of this agreement, shipper shall first so notify the conference in accordance with the provisions of Article 6 hereof.

4. *Rates of Freight:*

The CARRIERS agree to maintain rates of freight for the benefit of the SHIPPER lower than the ordinary rates on all commodities covered by this Agreement. In the absence of an accomplished Agreement the ordinary rate shall be 15% higher than the Contract (reduced) rate.

5. *Contracts of Carriage:*

This agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of

them. With respect to contracts of carriage made between the Shipper and one of the Carriers, none of the other companies referred to as Carriers shall be liable, jointly or severally, or in any way or to any extent.

The SHIPPER shall have the option of selecting any of the vessels operated by the several CARRIERS, subject to specific agreement between the transporting carrier and the SHIPPER as to quantity to be shipped on the carrying vessel, port or ports of loading and discharge, and as to all other matters affecting the transportation proper. This Agreement and any shipments made pursuant hereto, are subject to all the terms, conditions and exceptions expressed in the space booking contract, permits, dock receipts, mate's receipts and regular forms of bills of lading of the transporting carriers in use at the time of shipment, and to all of the rates, rules and regulations of the applicable Conference tariff.

6. *Release of SHIPPER:*

The CARRIERS severally agree to furnish from time to time, when requested by the SHIPPER, at the applicable contract rates, and subject to the conditions hereinafter stated, space for the aforesaid shipments of the SHIPPER to the discharging ports of the CARRIERS, provided that such space is available when the SHIPPER makes application therefor. In the event that none of the CARRIERS is able to furnish reasonably prompt space for specific shipments when requested by the SHIPPER, the latter will be free to forward such shipments by any vessel other than those of the CARRIERS without prejudice to the SHIPPER'S rights under this Agreement,

provided that the SHIPPER first notifies the Conference at San Francisco in writing of its inability to obtain space required, and allows the Conference forty-eight hours, not including Saturdays, Sundays and holidays, after receipt of such notice to confirm that the space is not available on the vessels of the CARRIERS.

7. *Notice of Rate Changes:*

(a) For the purpose of receiving notices of changes in rates from the CARRIERS, other than by required tariff publication, the SHIPPER shall furnish to the Conference a list of commodities in which the SHIPPER is interested and, if requested by the SHIPPER, the CARRIERS shall thereafter give the SHIPPER prompt notice of all changes in rates applicable to commodities covered by this Agreement for which the SHIPPER requests such notice.

(b) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the shipper, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,* the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the _____ Conference Tariff. Should circumstances necessitate increasing the rates by

notice as aforesaid and should such increased rates be not acceptable to the shipper, the shipper may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however,* that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the shipper in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the shipper's notice of termination had never been given.

(c) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the carriers in the trade covered by this Agreement, the carrier or carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the shipper of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any carrier or carriers, said carrier or carriers shall forthwith reassume its or their rights and obligations hereunder and notify the shipper on fifteen (15) days' written notice that its suspension is terminated.

(d) In the event of any of the conditions enumerated in Article 7(c), which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the shipper, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(e) In the event of any extraordinary conditions not enumerated in Article 7(c), which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The shipper may, not less than 10 days' before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

8. *Rate Reductions:*

The CARRIERS shall give to the SHIPPER the full benefit of all rate reductions on commodities covered by this Agreement during the entire time such reductions are in effect.

9. *Additional CARRIERS:*

Any steamship line which may hereafter engage in the trades covered by this Agreement, and become a member of the Conference, shall thereby, and without further action on the part of the SHIPPER or the line, become a party to this Agreement, and the SHIPPER shall have the right to request shipping space of such line in accordance with all of the terms and conditions of this Agreement. Should any line or lines for any reason cease to be members of the Conference, then, following the expiration of thirty (30) days written notice of such cessation of membership given by the Conference to the SHIPPER, all future rights under this Agreement of such line or lines and of the SHIPPER as to any such line or lines shall cease and terminate.

10. *Breach of Agreement:*

(a) Damages for breach of this agreement shall be liquidated damages, computed by the amount the Shipper would have paid had he used a vessel of the Carriers at the contract rate or rates currently in effect, less the cost of loading and unloading.

(b) Upon the failure of the Shipper to pay or dispute his liability to pay liquidated damages as herein specified

for breach of the agreement within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Shipper's rights and obligations under the agreement until he pays such damages.

(c) If, within 30 days after receipt of such notice the Shipper notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 11, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Shipper's rights and obligations under the contract until he pays the damages.

(d) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(e) Payment of damages shall automatically terminate suspension.

(f) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

(g) In order that the conference may investigate the facts as to any shipment of the Shipper that has moved, or that the Shipper or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Shipper, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which re-

late thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Shipper where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Shipper and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

10.(h) Within ten (10) days after the event in any transaction in which the Shipper is a party and the legal right to select the carrier is vested in a person other than the Shipper, and if he has knowledge that the shipment has been made via a nonconference carrier, the Shipper shall notify the conference in writing of this fact, giving the names of the shipper and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however,* That where the activities of Shippers are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Shipper shall give notice as promptly as possible after the event.

11. *Arbitration:*

In case of any dispute under this Agreement, the parties agree to submit the dispute to arbitration, each party appointing an arbitrator and the two so chosen to select an umpire, to which Arbitration Committee all data, information and material requested by the Committee or by either party shall be furnished. Either party may demand arbitration by mailing to the other written notice thereof, specifying the name and address of the arbitrator chosen

by it, and a brief description of the matter in dispute. If either party fails, within thirty (30) days of the mailing of the first party's notice demanding arbitration, to appoint an arbitrator as required by the terms of this article, then the other party shall have the right, without further notice, to appoint the second arbitrator with the same force and effect as if the second arbitrator had been appointed by the party receiving notice of a demand for arbitration. The decision, in writing, of two or more members of said Arbitration Committee shall be binding upon all parties, and any award shall be paid within thirty (30) days after a copy of the decision of the Arbitration Committee has been mailed by the Committee to the party held liable, failing which payment, judgment upon the award may be entered in any court having jurisdiction. Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

12. *Cancellation:*

Unless earlier terminated as herein provided, this Agreement shall remain in effect indefinitely provided, however, it may be cancelled by either party giving to the other ninety (90) days written notice of intention to terminate the same.

13. *Applicability of Shipping Act and Contract Amendments:*

(a) This agreement shall be construed in the light of the Shipping Act, 1916, and the Rules and Regulations of the Federal Maritime Commission.

(b) This agreement may be amended from time to time subject to the permission of the Federal Maritime Commission.

IN WITNESS WHEREOF, the parties have executed this Agreement the _____ day of _____, _____.

Appendix A:

_____

"NOTE: The clause approved by the Federal Maritime Commission relating to "open rates" may be used in this contract at the option of the Carrier."

Served
June 24, 1965
Federal Maritime Commission

FEDERAL MARITIME COMMISSION
DUAL RATE CONTRACT PROVISIONS FOR PACIFIC COAST EUROPEAN CONFERENCE, LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE, AND PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE

(Docket Nos. 1007, 1092, & 1057)

NOTICE OF PROPOSED RULEMAKING

Pursuant to the direction of the United States Court of Appeals for the Ninth Circuit in *Pacific Coast European Conference, et al.* v. *Federal Meritime Commission and United States of America* (Nos. 19,237, 19,238, and 19,239, February 3, 1965), and in accordance with the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. 1003 *et seq.*), the Federal Maritime Commission hereby gives notice that it intends to promulgate the following clauses as required clauses for the dual rate contracts of the three conferences named above. The Court of Appeals found that the conferences were not given notice, as required by the Administrative Procedure Act, of the subject matter of these clauses, and this Notice is intended to correct that deficiency. Interested parties may submit such comments, views, or arguments in regard to the clauses as they desire, by submitting same in an original and fifteen copies within twenty (20) days of the date of publication of this notice to the Secretary, Federal Maritime Commission, Washington, D. C. 20573.

The proposed clauses are:

The Conference shall offer to the shipper a subscription to its tariffs at a reasonably compensatory price; however, the shipper shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the shipper's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Maritime Commission rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this agreement.

By the Commission.

(Seal)

/s/ Thomas Lisi
Thomas Lisi
Secretary

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Federal Maritime Board v. *Isbrandtsen Co.*, 356 U.S. 481	3
Pacific Straits Conference v. *Federal Maritime Commission*, 350 F. 2d 864	5
Swedish-American Line v. *Federal Maritime Commission*, No. 18,554, C.A.D.C., decided June 10, 1965	9

Statutes:

Shipping Act, 1916, as amended, 75 Stat. 762, 46 U.S.C. 813a *et seq.*:	
Sec. 14b	2, 3, 5, 6, 7, 8, 9
Sec. 15	9

Miscellaneous:

27 Fed. Reg. 2647	4
28 Fed. Reg. 74	4
S. Rep. No. 860, 87th Cong., 1st Sess.	7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, AND THEIR RESPECTIVE MEMBER LINES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 350 F. 2d 197. The opinion of the Federal Maritime Commission is reported at 3 S.R.R. 677.

JURISDICTION

The judgments of the court of appeals were entered on February 3, 1965, and an order denying petitions for rehearing was entered on April 30, 1965. The petition for a writ of certiorari was filed on September 27, 1965, within the extension of time granted on July 17, 1965 (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 14b of the Shipping Act, 1916, as amended, authorizes the Federal Maritime Commission to require dual rate contracts to include provisions not submitted by steamship conferences and not required by Sections 14b(1) to (8)?

2. Whether the Commission may formulate the provisions of such contracts in rulemaking proceedings, rather than on a contract-by-contract basis?

STATUTES INVOLVED

Section 14b of the Shipping Act, 1916, as amended, 75 Stat. 762, 46 U.S.C. 813a, is set forth in the Petition Appendix A, pp. 1-4.

STATEMENT

Petitioners, two conferences of common carriers by water in the foreign commerce of the United States, challenge two Federal Maritime Commission orders which prescribed the form of the "dual rate" contract they are required to use. Dual rate contracts grant

lower than regular freight rates to shippers who obligate themselves to ship exclusively via conference vessels.

In 1958, this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, held the dual rate contract there involved, notwithstanding its approval by the Maritime Board, to be in violation of Section 14, Third, of the Shipping Act, 1916. The effect was to cast doubt upon the legality of dual rate systems then in use. On October 3, 1961, Congress passed Public Law 87-346, 75 Stat. 762, which added Section 14b to the Shipping Act, 1916. The section requires that (a) the Commission permit the use of a dual rate contract unless it finds that the contract "will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair * * *"; (b) the contract expressly provide for eight specific contingencies (§14b(1)-(8)); and (c) the contract contain "such other provisions not inconsistent herewith as the Commission shall require or permit." (Section 14b(9)). Section 3 of Public Law 87-346 provided for the interim validity of existing contracts and required the conferences to revise their contracts to comply with the provisions of the amended Shipping Act and to file the revised contracts for approval within six months after enactment of the 1961 amendment.

Petitioners are two of the sixty conferences which filed contracts with the Commission for approval. Each of the contracts was published in the Federal Register and comments thereon were invited. Subse-

quent to the filing of the contracts, the Commission gave notice by publication in the Federal Register (27 Fed. Reg. 2647) that it was considering the adoption of a uniform contract and later published a "Notice of Proposed Final Rules and Uniform Agreement" (28 Fed. Reg. 74) in which the Commission's proposed uniform contract was set out.

After considering comments and protests directed to the adoption of a uniform contract, the Commission scheduled individual hearings for each contract filed for approval. Contracts which covered related trades, or which contained similar terms, were consolidated for hearing, resulting in some twenty-two separate proceedings and a hearing examiner was assigned to each proceeding. At the instigation of shippers and shipper-related associations who were faced with the burden of participating in all twenty-two hearings, the Commission severed the so-called "major issues" from the individual hearings and assigned a panel of five hearing examiners to conduct the major-issues proceedings, which was designated Docket No. 1111. Thereafter, the panel rendered its decision in Docket No. 1111 and the hearing examiners assigned to the twenty-two hearings made their initial decisions which approved the contracts with modifications.

On March 27, 1964, the Commission issued a single report entitled *The Dual Rate Cases* (Supp. App. to Pet., 119-180), in which it ruled on all the exceptions made to the decisions in the separate hearings and in Docket No. 1111. The Commission explained that it had discussed all the contracts submitted for approval

in one report for the reason, among others, that the legislative history of the 1961 amendment made it plain that "insofar as was possible dual rate contracts should be standard or uniform" (*id.* at 127) in order to simplify the problem of shippers regarding the meaning and application of the contract provisions (*id.* at 127-129). The Commission approved all contracts which were submitted but with certain modifications which it believed were authorized by Section 14b. The modifications included provisions which Section 14b did not specifically require (*id.* at 160, *et seq.*), certain of which had not been dealt with in any of the hearings before the examiners. The orders entered by the Commission approved the contracts "in the form attached to this order" and provided that the attached form of contract should be used "to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates" (Supp. App. to Pet., p. 227, 241).

Of the sixty conferences affected by the Commission's ruling, the two petitioners in this Court and two other conferences [1] filed petitions for review. The court of appeals held that Section 14b(9) authorized the Commission to add provisions in the dual rate contracts which are neither specifically required by

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[1] The other conferences, Latin America/Pacific Coast Conference and Pacific Straits Conference, have sought no further review in this Court. The former was a party below in the instant case (Pet. App. B, p. 1) and the latter's petition was disposed of in a later *per curiam* opinion on the basis of the decision in the instant case. *Pacific Straits Conference* v. *Federal Maritime Commission*, 350 F. 2d 864 (C.A. 9).

Congress nor submitted by the conferences (Pet. App. B, p. 8). It further held that the procedures followed by the Commission were proper except as to those provisions which the Commission required to be included in the contract which had not been considered in the hearings before the examiners. As to these, the court remanded the matter to the Commission with directions to allow the petitioners an opportunity to be heard regarding them. The petition for a writ of certiorari followed.

ARGUMENT

The petition presents no substantial question warranting further review by this Court. There is no conflict between the circuits, and the decision below is plainly correct.

1. Petitioners assert that the court below "refused to consider whether the substance of the Commission's order was inconsistent with the eight specific requirements of Section 14b * * *." (Pet. 16). The fact is, however, that petitioners in effect abandoned any claim of inconsistency. While making the broad assertion of inconsistency, petitioners failed to particularize just how the contracts which the Commission ordered them to use are inconsistent with the statute. The court below therefore properly concluded that petitioners were "not primarily attacking the substance of the contracts approved by the Commission * * *" (Pet. App. B, p. 7). Moreover, petitioners continue to refrain from specifying any inconsistency between the Commission's form contract and the statute.

2. Petitioners seem to question the authority of the Commission to require that the contracts include provisions which were not submitted by the conferences and which were not specified by Congress in Section 14b (Pet. 17). Section 14b(9), however, provides that dual rate contracts shall contain "such other provisions not inconsistent herewith as the Commission shall require or permit." The court below found in this unambiguous language "plain authority in and direction to the Commission to give consideration to and to require agreement on other matters than those occurring to Congress" (Pet. App. B, p. 8). Moreover, the legislative history, cited by both the Commission (Supp. App. to Pet., pp. 127-128, 146, n. 13) and the court (Pet. App. B, notes 7 and 8, pp. 8-9), strongly supports this construction.[2] The Senate Commerce Committee, in reporting on that portion of the bill which became section 14b(9), declared (S. Rep. No. 860, 87th Cong., 1st Sess., 14):

> This provision should be read in conjunction with section 7 of the amended bill which would add a new section 43 to the Shipping Act, 1916, which would direct the Commission to make such rules and regulations as may be necessary to carry out the provisions of the Shipping Act.
>
> This broad rulemaking mandate should move the Commission, for example, to deal with three

[2] It was likewise Section 14b(9), and the legislative history cited above, which support the Commission's authority, as the court below held (Pet. App. B, pp. 8-10), "to seek uniformity to the extent possible" (*id.*, p. 9) by requiring all conferences to adopt a standard contract except for such variations as the different trade areas required.

> matters which the National Industrial Traffic League has urged upon us and upon the House committee. While we would be strongly opposed to trying to freeze into legislation the solution to any of these three problems, they present matters which it seems to us the Commission is equipped to an [sic] should deal with under its rulemaking function.

In support of their position that Congress intended no implementation of the statutory standard, petitioners point to another passage of the same Senate Report which declares that "any contract which contains the eight safeguards expressly required by the amended bill makes out a prima facie case" for approval by the Commission (Pet. 17). Petitioners fail to disclose, however, that the eighth safeguard in the amended bill on which the Senate Commerce Committee was reporting was the provision which ultimately became Section 14b(9) (S. Rep. No. 860, at p. 39). The passage quoted by petitioners thus reinforces the correctness of the decision, for the eighth safeguard to which the Committee was referring provided that the contract shall contain "such other provisions * * * as the Commission shall require * * *." (*Ibid.*)

3. The court below was plainly correct in holding that the Commission was not required to proceed on a contract-by-contract basis and adjudicate whether each contract meets the statutory standards. In formulating "the terms and conditions under which dual rates might be charged," the Commission's action, the court ruled, "was legislative rather than judicial in character. It was a prospective determination of the

standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met." (Pet. App. B., p. 11.) The legislative history relied on by the court (Pet. App. B, notes 7-9, pp. 8, 9 and 11) shows unmistakably the Congressional expectation that the Commission would proceed by rule making. Petitioners have no real cause for complaint for, as the court below noted, they "have already, through the hearings which have been had, enjoyed to the fullest participation in the making of the resulting rule in the areas covered by those hearings." (*Id.*, p. 13). As to those provisions which the Commission required to be included in the contract and regarding which petitioners had not been given an opportunity to be heard, the court remanded the case to the Commission with instructions to correct the deficiency.[3]

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[3] Contrary to petitioners' assertion (Pet. 22-24), the *Swedish-American Line* case, No. 18,554, decided June 10, 1965, C.A.D.C., is not in conflict. In the first place, the Commission's disapproval of the conference agreement provisions there involved was under Section 15 of the Shipping Act, which contains no language comparable to Section 14b(9). More important, that case did not involve rule-making but merely whether the Commission's findings in an adjudicatory proceeding were sufficient to support its conclusions.

CONCLUSION

The petition for a writ of certorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

IRWIN A. SEIBEL,
Attorney.

MILAN C. MISKOVSKY,
Solicitor,

WALTER H. MAYO, III,
Attorney,
Federal Maritime Commission.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, and their Respective Member Lines,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

GRAHAM JAMES & ROLPH
LEONARD G. JAMES
ROBERT L. HARMON
F. CONGER FAWCETT
310 Sansome Street
San Francisco, California 94104
Attorneys for Petitioners

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

INDEX

	Page
Introduction	1
1. The Substance of the Commission's "Uniform Contract"	4
2. The Extent of Permissible Action Under Subsection 14b(9)	5
3. Rule-Making, Adjudication, and the Administrative Procedure Act	7
4. Svenska	10
Conclusion	11

CITATIONS

Cases

	Pages
Aktiebolaget Svenska Amerika Linien (Swedish-America Line) v. Federal Maritime Commission, D.C.Cir. No. 18544 (June 10, 1965)	10
Burlington Truck Lines v. United States, 371 U.S. 156 (1962)	6, 8
Federal Communications Commission v. RCA Communications, 346 U.S. 86 (1953)	6
Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958)	6
National Labor Relations Board v. Metropolitan Life Insurance Co., 380 U.S. 483 (1965)	8
S.E.C. v. Chenery Corp., 332 U.S. 194 (1947)	8
United States v. Morton Salt Co., 338 U.S. 632 (1950)	2
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)	10

Statutes

Administrative Procedure Act, 5 U.S.C. §§1001 et seq.	passim
Public Law 87-346, 75 Stat. 762 et seq.	3
Shipping Act, 1916, 46 U.S.C. §§801 et seq.	passim

Miscellaneous

Attorney General's Manual on the Administrative Procedure Act (1947), pp. 5-7	10
Congressional Record	3
H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961), pp. 12-13	3
Sen. Rep. No. 860, 87th Cong., 1st Sess. (1961), pp. 14-15	5, 10
5 S.R.R. 289 (FMC 1964)	3
5 S.R.R. 529, 532 (FMC 1964)	3
6 S.R.R. 498, 504 (1965)	3

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

INTRODUCTION

The short Brief in Opposition to the grant of certiorari requested by petitioners herein, filed by the Solicitor General and the respondent Federal Maritime Commission, treats the matter before the Court as an insignifi-

cant bit of trivia and, glossing over petitioners' specific questions and objections, attempts to dismiss the gravity of the proceeding with two unfocused, generalized "questions presented" which, as stated, do not even begin to approach the issues actually involved.

The issues which *are* involved are of overwhelming significance to a vast segment of United States industry, involving as they do novel and precedent-shattering interpretations of two great statutes:

(a) The Shipping Act, 1916—the regulatory statute which governs all ocean shipping to and from the United States, and

(b) The Administrative Procedure Act—the statute which governs the procedures of not only this particular regulatory agency but of nearly every other administrative agency of the United States.

The latter Act, once hailed by this Court as a landmark enactment "creat[ing] safeguards, even narrower than the constitutional ones, against *arbitrary official encroachment on private rights,*"[1] has literally been disemboweled by the opinion of the Court below, and here fights for its very life: If the slippery and easy non-observance of the Administrative Procedure Act sanctioned (indeed, in large measure created) by the Court below passes uncorrected by this Court, it will indeed be as effectively dead as if by direct Congressional repeal.

The future administration of the Shipping Act, too, hangs in the balance. Substantively, and specifically con-

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[1] *United States v. Morton Salt Co.*, 338 U.S. 632, 664 (1950) (supplying emphasis).

cerning the Section directly involved, the new Section 14b, the respondent Commission has clearly and flatly announced that, henceforth, new applications to institute "dual rate" systems, and requests for modifications of old systems, will be measured and governed, not by Section 14b, but wholly by the omnibus "Dual Rate Cases" report.[2] Procedurally, and notwithstanding the government's purported distinction (see *infra*, heading 4), the future administration of the keystone Section 15, as well as 14b, is even more gravely jeopardized: If an "order, after notice and hearing" is held (as here it has been) to authorize off-the-record rulemaking in the one instance, logically it must also be so in the other—entirely contrary to an unbroken half-century of administrative and judicial interpretation.

Finally, before turning to a brief analysis of the Solicitor General's several arguments, it is well to bear in mind the unfavorable predisposition of the Department of Justice toward the whole "dual rate contract" concept. Having joined in opposing such a system in *Isbrandtsen*,[3] the Department of Justice, virtually alone among the many concerned federal agencies, worked vigorously for the defeat or severe crippling of the enabling Public Law 87-346, and, indeed, was one of the earliest, staunchest proponents of a "mandatory, uniform contract."[4] The

---

[2]See, e.g., 5 S.R.R. 289 (F.M.C. 1964); 5 S.R.R. 529, 532 (F.M.C. 1964); 6 S.R.R. 498, 504 (Initial Decision, 1965).

[3]*Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

[4]See H.R.Rep. No. 498, 87th Cong., 1st Sess., pp. 12-13 (1961); Sen. Rep. No. 860, 87th Cong., 1st Sess., pp. 2, 11-14, 21, 30-37 (1961); and countless pages of the Congressional Record, too numerous to list here.

Department continues its active opposition to any workable contract system in this very case, in the Court below and now before this Court.

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1. THE SUBSTANCE OF THE COMMISSION'S "UNIFORM CONTRACT"

The Solicitor General's assertion that "petitioners in effect [whatever that means] abandoned any claim of inconsistency" [p. 6] is as thoroughly false as the argument which proceeds from it. Petitioners devoted nearly one-third of their opening brief and a full one-half of their reply brief, in the Court below, to a *particularized, clause-by-clause* examination of some of the more objectionable of the almost countless inadequacies and inconsistencies of the Commission's "uniform contract", measured against the terms of the statute. Why the Court below chose (as admittedly it did) to ignore all of this painstaking detail of "the substance of the contracts," in its final decision, is perhaps best explained by the self-evidently hostile attitude of that Court, to which its entire incredible opinion bears witness. That the Court so casually sloughed off petitioners' squarely presented argument, however, is no excuse for the government's now contending that the argument was never made! At least those on brief with the Solicitor General, who participated in the proceedings below, know better.

No more fair, or accurate, is the government's suggestion that, on petition here, petitioners "continue to refrain" from specificity. The obvious space limitations of an

already crowded petition have manifestly precluded any such provision-by-provision analysis, at this threshold point; again, however, this is no justification for the assertion that such analysis was not made, will not be made, or has been "abandoned"—"in effect" or otherwise. The charge is unjust and groundless.

---

2. THE EXTENT OF PERMISSIBLE ACTION UNDER SUBSECTION 14b(9)

As should be clear from our petition itself, we do not, of course, maintain that "Congress intended no implementation of the statutory standard" by and through the catch-all 14b(9), as the government's brief unjustly advises the Court [p. 8]. We of course do not deny the existence of the subsection.

What we do most emphatically deny, however, is that the Commission was, thereby, empowered not only to add page upon page of mandatory provisions on "other matters than those occurring to Congress"[5] but, as well, to revise and rewrite completely *every one* of the provisions which *did* "occur to Congress"! As implemented by the Commission, and chaotically sustained by the Court of Appeals, subsection 14b(9) did not "implement" the rest of Section 14b; it *ousted and supplanted* it![6]

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[5]Opinion of the Court below, App. B, p. 8; 350 F.2d at 203.

[6]The very language of the subsection itself, of course, indicates that its subject matter was to be *"other* provisions" than the Congressionally-enumerated eight which precede it. See also Sen. Rep. No. 860, 87th Cong., 1st Sess., 14-15 (1961).

What we do emphatically maintain is that the subsection was not—as constitutionally it could not be—intended as *carte blanche* authority for wholesale agency "legislation," circumscribed only by Commission whim and "desirability". This Court has in the past been quick and unequivocal in curbing this sort of freewheeling agency discretion, stating:

> "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Burlington Truck Lines v. United States,* 371 U.S. 156, 167 (1962); *Federal Communications Commission v. RCA Communications,* 346 U.S. 86, 90 (1953).

Finally, what we maintain is that, in the context of the section of which it is a part, subsection 14b(9) could legitimately be used to "require" (as opposed to "permit") additional clauses *only* when and where a deficiency, necessitating such correction, was actually *found,* on *record evidence,* to exist.[7] Otherwise the entire scheme of the section, requiring an "order", "after notice, and hearing," becomes meaningless, a pointless ritual—to borrow the words of Mr. Justice Frankfurter in the progenitor of the instant case, "a carnival of procedural emptiness."[8]

---

[7]The dissenting Commissioner Patterson so recognized; see, e.g., Supp. App. 184-185, 187.

[8]*Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. at 518 (1958) (dissenting opinion).

3. RULE-MAKING, ADJUDICATION, AND THE ADMINISTRATIVE PROCEDURE ACT

In fact, however, it is just such a "carnival of procedural emptiness" which the Court below created, and the Solicitor General seeks here to defend, in holding the Commission's action to have been permissible rule-making, legitimately achieved. Assuming, *arguendo*, that the Commission was so permitted to proceed, and notwithstanding the fact that its final action had all *appearances* of rule-making, the indisputable *fact* remains that the Commission itself *purported* to be *adjudicating*, in "The Dual Rate Cases" report: it repeatedly refers to its action as a "decision" [e.g., Supp. App. 126, 129], speaks of "findings" [Supp. App. 176, 180], and, ultimately, enters orders ostensibly of "approval" [Supp. App. 119, 126]; moreover, in attempting to implement (albeit arbitrarily) the bewildering "order of remand" of the Court, the Commission again entered final "orders of approval" [Supp. App. 257-258, 271-273] *as well as* a "notice of proposed rule-making" [Supp. App. 288-289], all simultaneously!

The first error, of both Court and Solicitor General, then, is one of *fact:* Whether or not the Commission was *authorized* to proceed by way of general rule, in "The Dual Rate Cases" it *was not* purporting to do so. As Commissioner Patterson correctly observed, it only turned out to *look* that way—but without Commission acknowledgment of it.[9] Assuming this discretionary authority, the Court below nevertheless erred in upholding the Commis-

[9] Supp. App. 185-186.

sion's action as rule-making, since as this Court has stated:

> "Chenery[10] requires that an agency's discretionary order be upheld, if at all, on the *same basis articulated in the order* by the agency itself." *Burlington Truck Lines, supra,* at 168-169; *N.L.R.B. v. Metropolitan Life Insurance Co.,* 380 U.S. 483 (1965) (emphasis and footnote supplied).

The second base point of error, committed by the Court and compounded by the Solicitor General, is in their complete ignorance of the Administrative Procedure Act. Assuming, again, that Congress *did* intend the Commission to create a "uniform" contract[11] by way of rule, still—by the lower Court's amazingly candid admission—the Commission did not in any fashion follow that Act's requirements for rulemaking. Commissioner Patterson's comment, alone against Commission, appellate Court, and high counsel, gives the lie to all of their glib rationalizations:

> "There is no doubt that Congress intended that we should establish standards for dual-rate contracts and that we would be expected to provide a standard form of contract which all conferences might utilize, as the majority says. I am confident that it was equally expected that we would observe existing laws governing procedures to be followed in achieving the intended results. The assertion of an expectation by a Congressional Committee does not justify abandonment of existing prescriptions of law. Congressional

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[10] *S.E.C. v. Chenery Corp.,* 332 U.S. 194 (1947).

[11] Of permissible, rather than compulsory, use, perhaps—as Commissioner Patterson suggested (see text), "a standard form of contract which all conferences *might* utilize."

> expectations are not enough to repeal Sec. 4 of the Administrative Procedure Act in regard to these contracts . . . .
>
> "The desirability of uniform results is assigned as a reason for compulsory rule-made provisions. Desirability, however, is no substitute for statutory compulsion. The majority has committed a fatal error in not complying with the Administrative Procedure Act." [Supp. App. 187-188].

The Solicitor General compounds his disdain for the Administrative Procedure Act in urging upon this Court the bizarre and totally inadequate theory of "relief" for petitioners which the lower Court, in its ingenuity, created. Notwithstanding the appellate Court's acknowledgment that, "The deficiency here [in the Commission's "rule-making"] was in *failure to give any notice whatsoever,*"[12] the Solicitor General, like that Court, professes to believe that "participation" in adjudication *ipso facto* equals "participation in the making of [a] rule" and that, accordingly, "Petitioners have no real cause for complaint" [p. 9].

There is something deeply and fundamentally wrong in this approach. No one can honestly read the lower Court's opinion without experiencing some degree of amazement at the step-by-step dismemberment of the Administrative Procedure Act and the orderly process of administrative law, as that Court bootstraps and strains toward its overall affirmance. Yet the Solicitor General professes to find nothing amiss in that opinion—indeed,

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[12]App. B., p. 13; 350 F.2d at 206.

twice terms it "plainly correct"! [pp. 6, 8]. Petitioners most respectfully submit that the law is ill-served when the offices of the Highest Court's chief counsel, legal advisor above partisanship, and oft-termed "Tenth Member" of the Court, can so callously and unabashedly be turned to the willing demolition of the very landmark Act which his own Department most instrumentally and proudly helped bring to fruition.[13]

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4. SVENSKA

We have already answered the Solicitor General's two superficial distinctions between the instant case and *Svenska,*[14] in our petition proper [Pet. pp.22-24].[15] All that is here needed is to retrieve the importance of this case from the footnoted obscurity to which the Brief in Opposition has relegated it, and to urge the Court, once again, to consider carefully the clear conflict presented in the petition.

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[13]See, e.g., *Wong Yang Sung v. McGrath,* 339 U.S. 33, 38-40, 44 (1950); Attorney General's Manual on the Administrative Procedure Act, pp. 5-7 (1947).

[14]*Aktiebolaget Svenska Amerika Linien (Swedish-America Line) v. Federal Maritime Commission,* D.C. Cir. No. 18554 (June 10, 1965).

[15]However, regarding his first point, that Section 15 has no comparable language to 14b(9), it is perhaps worth observing that the very language from Senate Report 860 which the Solicitor himself quotes, two pages earlier, to support the supposed breadth of 14b(9), *conjoins it with Section 43,* which of course applies to the *whole* Act.

CONCLUSION

For the reasons set forth in the petition and amplified herein, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated December 6, 1965.

Respectfully submitted,

GRAHAM JAMES & ROLPH
LEONARD G. JAMES
ROBERT L. HARMON
F. CONGER FAWCETT
Attorneys for Petitioners